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OF THE
NORTH CAROLINA HISTORICAL COMMISSION
BULLETIN No. 22

PROCEEDINGS

OF THE

SEVENTEENTH ANNUAL SESSION

OF THE

State Literary and Historical Association of North Carolina

RALEIGH
December 5-6, 1916

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Compiled by

R. D. W. CONNOR

Secretary

RALEIGH
EDWARDS & BROUGHTON PRINTING CO.
STATE PRINTERS
1917

The North Carolina Historical Commission

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W. J. Peele, Raleigh.

D. H. Hill, Raleigh.

Thomas M. Pittman, Henderson.

M. C. S. Noble, Chapel Hill.

R. D. W. Connor, *Secretary*, Raleigh.

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1915-1916.

President ..... Howard E. Rondthaler, Winston-Salem.
First Vice-President ..... Miss E. A. Colton, Raleigh.
Second Vice-President ..... Francis D. Winston, Windsor.
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(With Above Officers).

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1916-1917.

President ..... H. A. London, Pittsboro.
First Vice-President ..... Mrs. Marshall Williams, Faison.
Second Vice-President ..... T. M. Pittman, Henderson.
Third Vice-President ..... Mrs. W. N. Reynolds, Winston-Salem.
Secretary-Treasurer ..... R. D. W. Connor, Raleigh.

Executive Committee
(With Above Officers).

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PURPOSES OF THE STATE LITERARY AND HISTORICAL ASSOCIATION

"The collection, preservation, production and dissemination of State literature and history;

"The encouragement of public and school libraries;

"The establishment of an historical museum;

"The inculcation of a literary spirit among our people;

"The correction of printed misrepresentations concerning North Carolina; and—

"The engendering of an intelligent, healthy State pride in the rising generations."

ELIGIBILITY TO MEMBERSHIP—MEMBERSHIP DUES.

All persons interested in its purposes are invited to become members of the Association. There are two classes of members: "Regular Members," paying one dollar a year, and "Sustaining Members," paying five dollars a year.

RECORD OF THE STATE LITERARY AND HISTORICAL ASSOCIATION.

(Organized October, 1900).

Fiscal Years.	*Presidents.*	*Secretaries.*	*Paid up Membership.*
1900-1901	Walter Clark	Alex. J. Feild	150
1901-1902	Henry G. Connor	Alex. J. Feild	139
1902-1903	W. L. Poteat	George S. Fraps	73
1903-1904	C. Alphonso Smith	Clarence Poe	127
1904-1905	Robert W. Winston	Clarence Poe	109
1905-1906	Charles B. Aycock	Clarence Poe	185
1906-1907	W. D. Pruden	Clarence Poe	301
1907-1908	Robert Bingham	Clarence Poe	273
1908-1909	Junius Davis	Clarence Poe	311
1909-1910	Platt D. Walker	Clarence Poe	440
1910-1911	Edward K. Graham	Clarence Poe	425
1911-1912	R. D. W. Connor	Clarence Poe	479
1912-1913	W. P. Few	R. D. W. Connor	476
1913-1914	Archibald Henderson	R. D. W. Connor	435
1914-1915	Clarence Poe	R. D. W. Connor	412
1915-1916	Howard E. Rondthaler	R. D. W. Connor	501
1916-1917	H. A. London	R. D. W. Connor	521

AWARDS OF THE PATTERSON MEMORIAL CUP.

1905—John Charles McNeill, for poems later reprinted in book form as "Songs, Merry and Sad." (Presentation by Theodore Roosevelt.)
1906—Edwin Mims, for "Life of Sidney Lanier." (Presentation by Fabius H. Busbee.)
1907—Kemp Plummer Battle, for "History of the University of North Carolina." (Presentation by Francis D. Winston.)
1908—Samuel A'Court Ashe, for "History of North Carolina." (Presentation by Thomas Nelson Page.)
1909—Clarence Poe, for "A Southerner in Europe." (Presentation by James Bryce.)
1910—R. D. W. Connor, for "Cornelius Harnett: An Essay on North Carolina History." (Presentation by T. W. Bickett.)
1911—Archibald Henderson, for "George Bernard Shaw: His Life and Works." (Presentation by Lee S. Overman.)
1912—Clarence Poe, for "Where Half the World is Waking Up." (Presentation by Walter H. Page.)
1913—Horace Kephart, for "Our Southern Highlanders." (Presentation by Maurice G. Fulton.)
1914—J. G. deR. Hamilton, for "Reconstruction in North Carolina." (Presentation by W. K. Boyd.)
1915—William Louis Poteat, for "The New Peace." (Presentation by Josephus Daniels.)
1916—No Award.

WHAT THE ASSOCIATION HAS ACCOMPLISHED FOR THE STATE—SUCCESSFUL MOVEMENTS INAUGURATED BY IT.

1. Rural libraries.
2. "North Carolina Day," in the schools.
3. The North Carolina Historical Commission.
4. Vance statue in Statuary Hall.
5. Fire-proof State Library Building and Hall of Records.
6. Civil War battlefields marked to show North Carolina's record.
7. North Carolina's war record defended and war claims vindicated.
8. Patterson Memorial Cup.
9. Lecture Extension Work started in leading cities and towns.
10. A program of Library Extension Work begun.

STATE ART COMMISSION.

At the session of the Association in 1915 a committee was appointed to report to the session of 1916 on the advisability of the State's creating a State Art Commission. The committee reported the proposal favorably, and submitted a proposed bill for that purpose. This bill was approved by the Association. It was introduced in the General Assembly of 1917, but failed of passage. It will again be introduced in 1919. In the meantime the Literary and Historical Association will undertake to create sufficient sentiment for the measure to insure its success.

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Proceedings and Addresses of the State Literary and Historical Association of North Carolina

MINUTES OF SEVENTEENTH SESSION

RALEIGH, DECEMBER 5-6, 1916

Tuesday, December 5th.

The Seventeenth Annual Session of the State Literary and Historical Association of North Carolina was called to order in the auditorium of Meredith College, Raleigh, N. C., Tuesday evening, December 5, 1916, at 8:30 o'clock, with President Rondthaler in the chair. After a few opening remarks, congratulating the Association upon its successful work in the past, President Rondthaler delivered the annual presidential address. At the conclusion of the President's address Miss Charlotte Ruegger, of Meredith College, rendered a violin solo accompanied by Miss Elizabeth Futrell. President Rondthaler then presented Mr. L. Ames Brown, a native of North Carolina who is now a newspaper correspondent of Washington, D. C., who read a paper on "The President and the Presidency." At the conclusion of Mr. Brown's paper the President of the Association announced that the Committee on the Award of the Patterson Memorial Cup had determined to make no award for the year 1916.

Wednesday Morning, December 6th.

The Association was called to order in the Hall of the House of Representatives by President Rondthaler at 10 o'clock. The President presented Dr. W. T. Laprade, Professor of European History in Trinity College, who read a paper on "A New Epoch." Dr. Laprade was followed by Dr. W. W. Pierson, Jr., Associate Professor of History at the University of North Carolina, who presented a paper on "The Sovereign State of North Carolina, 1787-1789." Prof. Collier Cobb, Professor of Geology at the University of North Carolina, followed Dr. Pierson, addressing the Association on "Historic Highways in North Carolina." At the conclusion of Mr. Cobb's address Mr. W. C. A. Hammel, Chairman of the Committee on a State Art Commission, presented the report of the Committee, which was embodied in a proposed bill for introduction into the General Assembly, providing for a State Art Commission of five members to act in an advisory capacity in the acquisition, erec-

tion and remodeling of State buildings, memorials, monuments, and other works of architecture and art. After some discussion the report of the committee was adopted, and the committee was authorized to have the bill introduced in the General Assembly, and to act as a steering committee to secure its passage.

The President appointed a nominating committee consisting of Hon. J. Bryan Grimes, Dr. R. B. Drane, Miss Mary O. Graham, Mrs. T. W. Lingle, and Mr. Marshall DeLancey Haywood.

It was moved and carried that a committee of three on increase of the membership of the Association be appointed, and the President stated that he would announce the committee later.

WEDNESDAY AFTERNOON, DECEMBER 6TH.

The session was called to order by President Rondthaler in the Hall of the House of Representatives at 3:30 o'clock. Mr. W. S. Wilson, Legislative Reference Librarian, read a paper on "Suffrage in North Carolina." He was followed by Mr. T. M. Pittman, member of the North Carolina Historical Commission, who presented a paper on "The History of Crimes and Punishment in North Carolina." Miss Minnie W. Leatherman, Secretary of the North Carolina Library Commission, presented a report on "North Carolina Bibliography for 1915-16." The Committee on Nominations reported the following nominations for the year 1916-17:

Major H. A. London, Pittsboro, President.
Mrs. Marshall Williams, Faison, First Vice-President.
T. M. Pittman, Henderson, Second Vice-President.
Mrs. W. N. Reynolds, Winston-Salem, Third Vice-President.
R. D. W. Connor, Raleigh, Secretary-Treasurer.

The report of the committee was unanimously adopted.

WEDNESDAY EVENING, DECEMBER 6TH.

President Rondthaler called the Association together at 8:30 o'clock, in the auditorium of Meredith College. The session was opened with a violin solo by Miss Charlotte Ruegger, accompanied by Miss Elizabeth Futrell. President Rondthaler then presented Governor Locke Craig, who introduced former President William Howard Taft. Governor Craig paid tribute to Mr. Taft's qualities of statesmanship and legal abilities, especially to those acts of his administration as President that tended to obliterate the sectional feeling between the North and the South. He characterized Mr. Taft as a genuine and true man, worthy of the high honors which the American people had bestowed upon him.

Mr. Taft addressed the Association on "Edward Livingston and His Relations to Thomas Jefferson, John Marshall, and Andrew Jackson." At the conclusion of Mr. Taft's address the Association adjourned *sine die*. Following the adjournment of the Association the Raleigh Woman's Club tendered a reception to the members of the Association and their guests, in their club rooms.

ADDRESSES

President's Address

BY HOWARD E. RONDTHALER.

A summary of the purposes of the State Literary and Historical Association of North Carolina, as published by the society in 1914, declares that this Association stands for six well-defined objects, to wit:

"The collection, preservation, production and dissemination of our State literature and history.

"The encouragement of public school libraries.

"The establishment of an historical museum.

"The inculcation of a literary spirit among our people.

"The correction of printed misrepresentations concerning North Carolina, and

"The engendering of an intelligent and healthy State pride in the rising generations."

It is with the sixth and last of these purposes that I am particularly concerned in these remarks, and I ask permission to paraphrase this statement in the following words:

"That we may learn to think intelligently and with healthy pride in terms of our own State," and this is nothing else than learning to add both to our national and local point of view that estimate which gives the State her full and well deserved place.

This will be recognized as that once, perhaps, over-emphasized point of view from which we have now too much receded. And it is a strangely far swing of the pendulum that such a statement could ever in fairness and truth be made of a considerable, if younger, portion of our North Carolina citizenship. But then, I submit, is it not a paradox that any American State so clearly and closely definable as is its legal entity and so jealously bounded as is its political individuality should at the same moment be so vaguely and faintly differentiated in its physical characteristics and in its social composition from any of its near-by neighbors?

No one who has crossed from one European country to another, especially if he has made the passage on foot, but has been struck by the instant demarkation. Probably some great natural physical boundary has, in the first place, emphasized that passage; then he has suddenly come into an environment of a new language, new customs, perhaps changed habits of dress, a new coinage, and over all and in constant reminder, a new flag.

Is it, perhaps, that some of the vagueness and indifference of our State-thought, especially in these restless days of ceaseless travel and transit, is due to this elemental geographic difficulty arising from the meandering, nondescript and inconsistent lines of demarkation which are supposed to separate us from our sister commonwealths?

With great zest and spirit we speak, and still more we sing, concerning the fair borders of this fair State, but, I submit, we well know the while we thus sing that in reality our borders are nothing but arbitrary lines, and that no living man can tell except he keep his eyes fixed upon some occasional marker when he really is passing from North Carolina into Tennessee, Georgia, South Carolina, or Virginia.

This State, like most others,—study the map for yourself—blends and blurs into the next neighbor, and, except for the word of the surveyor,—and history knows how they have quarreled about it—there is no boundary at all. Every day this imaginary line is traversed without let or hindrance, without challenge or ceremony, without sentiment, consciousness or concern.

Now that delight and distinctness of thought which is so necessary a constituent of patriotism demands and presupposes a certain fact of separateness, and the first great destroyer of physical distinctiveness is this blur of boundary so characteristic of North Carolina.

One may ask in all frankness and in all good affection for North Carolina, pray what have we which is geographically, geologically (elementally), physically distinctive which is really and separately ours and ours alone?

Our mountains? But are they indeed in their totality ours? Are they not first borrowed and then later shared? Do we not return them as a sort of loan from one State to be duly passed on to three other States?

Our rivers? Are they surely and fixedly ours? Have you, I may say confidentially, ever considered the extraordinarily unpatriotic and fickle conduct of our rivers? Three alone are there—the Cape Fear, the Tar, and the Neuse—that elect to abide at home in North Carolina where they were born, bred and brought up. As to the others, no sooner does the Yadkin grow up and see the chance than she not only deserts us, but even flaunts her infidelity by changing her very name and with additional gleeful insult, now that she is once gone from us, suddenly assumes the very unnecessary adjective "Great" to her new entitlement, becoming then the Great Pee Dee. The Dan,—well you know what the Dan does, how she flirts back and forth across the Virginia line, and as though to hide her inconsistency changes her name, too, in an eleventh-hour repentance, and in her now slowly declining course becomes at last

a returned prodigal Roanoke. The Little Tennessee and the fair French Broad leave us to go westward; and our thirsty neighbor, South Carolina, is almost wholly watered—mind you, *watered*—from North Carolina mountain sources.

What have we, then, both distinctive and separate? Our sand hills and pine forests? We share these both to the north and south, with this exception—that our sister States hid them with embarrassed apologies until we discovered that sand hills and pine barrens could be made to spell harvest and health—peaches in the crate and peach bloom on the cheeks.

Our far-famed and oft-sung climate? Do we not but take this while in transit from somewhere to everywhere? These whispering winds of which our poets sing, have they not whispered into other ears ere they found the ears of North Carolinians? and, departing hence, are they not but seeking and finding new fields for their gentle, albeit inconstant, sighings?

What is our own? The Dismal Swamp? Why even this we share with Virginia.

No wonder it is difficult to think with prompt clearness upon such a widely shared background. And what is more, the very size, and especially one peculiar dimension of this State, offers a sort of disconcerting challenge to that mind seeking obedience to the aforementioned sixth commandment of the State Literary and Historical Association of North Carolina: Thou shalt think of North Carolina with an intelligent and healthy State pride.

Though not the largest in the sisterhood of States, North Carolina is not frequently surpassed in size, but what is more to the point, there is ever that disconcerting peculiarity of one of the dimensions of North Carolina, *i. e.*, that ungainly diagonal of elongation from northeast to southwest, which produces a result peculiarly disturbing in an attempt at concrete and concentrated State-thinking. Nothing could be worse in this respect, except perhaps a panhandle, for every one who knows the panhandle States knows how really serious and distracting and unescapable an affliction a panhandle is in matters of State solidarity. It is, therefore, an unescapable item of fact in our State existence that, whereas we are of such comparatively limited dimensions in the direction in which most folks want to go and along which they therefore think, *i. e.*, north and south, we are so awkwardly overgrown in our chief dimension along the line which trade and traffic are least disposed to travel and people least accustomed to think. There have been men—I myself have known one such—who have journeyed those nearly five hundred miles from Cherokee to Currituck and have survived. The one

I knew always talked about it as an epoch, much as Washington Irving says men did in his boyhood who had actually been to Europe and back.

Of what, then, do we think when, in the spirit of our sixth associated duty, we strive to think not more highly than we ought to think, but to think soberly of dear old North Carolina? Probably, first of all, of a sort of picture on a map. North Carolina—there she lies—behold her? Now why is it that these map-makers always make North Carolina a pale green or a feeble pink? Can you imagine any less appropriate color for a rugged, sturdy, wrinkled old State? But is it not true that most of us, when we seek to visualize North Carolina, instantly see either faded green or insipid pink?

Or is our point of view when we "think North Carolina" a sort of instant mentally defiant attitude which we have through long experience come instinctively to assume as of those put on their defensive and ready with patriotic counter-rejoinder to offset some criticism or depreciation directed against our State?

Or is it a sort of sweet, lulling, sentimental, gentle, fragrant reverie into which we instantly drop? Magnolias and moonlight and crepe myrtles and mockingbirds?

Or is it that we attempt a confused and hurried review of places and scenes that we love—a certain town, appealing in its very homeliness; a certain neighborhood, very quiet and unspoiled; a certain landscape, gentle, verdant, forest-fringed and overhung with the bluest of skies?

Or is it that we think with a sudden heart-quickening sense of *just folks*—folks we know and folks who know us, folks we like and folks who like us, folks in whom we believe and whom we understand—our sort of folks, Carolina folks.

Of course if a citizen living within an American State had no especial reason to come into frequent and vital relationship with his own State it might be a matter of comparative indifference if his State point of view were vague and his State sentiment faint, but such is the organic construction of our American State that in reality we are very definitely dominated, directed, restrained and controlled thereby. The State, I submit, is designed to come into most intimately influencing and essential touch with our daily lives.

"All the civil and religious rights of our citizens depend upon State legislation; the education of the people is in the care of the State; with it rests the regulation of the suffrage; it prescribes the rules of marriage, and the legal relations of husband and wife, of parent and child; it determines the powers of masters and servants and the whole law of principal and agent, which is so vital a matter in all business transactions; it regulates partnership and debit and credit insurance; it con-

stitutes all corporations, both private and municipal; it controls the possession, distribution and use of property, the exercise of trade, and all contract relations; it formulates and administers all criminal law, except crimes against the United States, on the high seas, or against the law of nations. Space would fail in which to enumerate the particular items in this vast range of power; to detail its parts would be to catalogue all social and business relationships, to set forth all the foundations of law and order." I am quoting the definition of the State as given some years ago by Woodrow Wilson, a Professor of Jurisprudence and Politics in Princeton University.[1]

How could the extent and gravity of our relation to the State be more tersely and comprehensively set forth?

Has it perchance been the result of long dinning into our Southern ears that State spiritedness is unpatriotic—is at variance with national heartedness—that we see so great carelessness as to the State point of view? Or is it an extreme tendency to localism, each neighborhood group so intent upon its own affairs, yea each individual so self-centered, that the wider relations of life, to wit the State, is a matter of utter indifference? Has it perhaps been the hard problem of pruning our own private vine and cultivating our own private fig tree which has led us to undue concentration upon our own personal affairs at the cost of a State mindedness?

I have often looked down from the pinnacled top of our Pilot Mountain, Surry County, and observed in how many instances each single farm is clustered about and literally hemmed in with its own separating forest, so that a man's horizon is daily limited to his own immediate acres; and I have wondered whether this was perhaps both typical and explanatory of our prevailingly local point of view.

What, then, may serve to quicken this so desirable a State point of view? What, then, may contribute to heighten for us an intelligent and healthy appreciation of our own State?

Let a North Carolinian, when he thinks of his own State, learn to think of her in terms of abiding historic incident and of individual character and leadership. What a muster roll is ours in historic person, place, and event! The ever-kindling story of Roanoke Island and Virginia Dare; the successive settlements and distinctive influences of Quakers, Cavaliers, Swiss, Scotch, Scotch-Irish, and Germans; the Regulator War and the Battle of Alamance, Harvey, Harnett and Independence, Mecklenburg and Edenton, Moore's Creek and Guilford, Caswell, Ashe, Gates, Green, Davie, Swain, Vance, and Aycock. These and many others like them, these are ours, and these when known, studied

[1]The State, p. 473.

and appreciated, tend to foster an intelligent and healthy State pride. Let him think of North Carolina in terms of her friendly, well-knit, neighborly, well-acquainted folks—folks with a unique and special opportunity to know and esteem one another because free from the domination, political, social and commercial, of any single city, with its invariable overlording, its intolerant attitude and supercilious airs—those airs and that attitude which in other less fortunate States are so apparent in the city's smug assurance and rasping intolerance towards the rest of folks.

This State that obtains its leaders straight from the soil, and where no one ever dreams it necessary to offer an explanation or an apology because a man came from a farm or from a village.

While 46 per cent of the total population of the Nation is urban, which per cent in Massachusetts runs as high as 92 per cent, and in New York as 78 per cent, only 14 per cent of North Carolina's population lives in cities or towns with as many as 2,500 people. Indeed, all the so-called cities in North Carolina if combined would only give us a Reading, Pa., or a Trenton, N. J.

Let him learn to think in terms of a State abounding in that good foundation fact of the Republic—that is, home life; single households living as units and each under its own roof. And if he be challenged on this point, let him assure himself with the fact that of the 450,000 families of North Carolina only 2 per cent must combine to live at the unhappy rate of more than one family beneath the same roof.

He who would think of North Carolina, let him think in well justified terms of her marvelous progress. That his is the State which leads the Union in the number of cotton mills and factories and in the amount of raw cotton consumed, and ranks second only to Massachusetts in the value of manufactured cotton products. The State which has doubled the value of its manufactured products in the last six years; the State which leads all the South and Southwest in the number of manufacturing establishments, in the number of wage-earners, in the total amount of wages ($46,000,000), and in the values added annually by the processes of manufacture ($119,000,000).

That his is the State which can and does raise literally everything from sub-tropic figs to sub-arctic cereals and grasses, with a growing season that reaches as high as 267 days in the year. That his is the State which doubled its crop values from 1900 to 1910, and again from 1910 to 1916, and is now producing annually from its soil $242,000,000 worth of agricultural products.

But most of all, if he values his State point of view, let him learn to think of North Carolina in terms of service, a service due from him by

reason of his obligation to the past and a service laid upon him now with pressing insistence by those present conditions which challenge the spirit to serve on the part of all good citizens. We have come far in this present generation, but we shall have much before us that is compelling and constraining. Let him reflect that 71 per cent of all the land in North Carolina is today a wilderness of idle acres, 22 million such idle acres the most part of which is yet in scrub pine and broom sedge. Let him feel the challenge of this fact, *i. e.*, that we could double our present rural population without disturbing a single home or a single now cultivated acre and still have left 5 million wooded acres, forest enough for the fuel and lumber needs of our thus doubled rural population. That, although our pro rata actual school attendance outranks every other Southern State and is within 1 per cent of the average for the entire United States, and although illiteracy has dropped marvelously in the past ten years, and although our illiteracy per cent is now lower than that of any of our Southern neighbors, there are yet a quarter of a million of illiterates within the State. Let him include this fact in his point of view.

Let him in all good conscience hear and heed the call to community service, rural and urban. Let him enlist in the combat against preventable disease, poverty, juvenile crime, and all forms of social injustice. Let him be the sort of man who proves his love of North Carolina by serving North Carolina, and who earns his right to citizenship not by the accident of suffrage, but by the high claim of service—our North Carolina, old, wrinkled, worn and homely, yet alert, aggressive and virile, with a compelling quietness, a satisfying strength and a mastering gentleness! The sort of a State you have to love and, therefore, the sort of State you want to serve.

Edward Livingston

By William H. Taft.

When Secretary Root was urging me to accept President McKinley's appointment to the Philippines and was pointing out the reasons why I should go, he said, among other things, "You will have the same opportunity for making a Code that Livingston had in Louisiana." At the time I confess I only had an indefinite idea of who Livingston was, or what his Code was, and in the interval since that time my interest in him was not again aroused until in the study of the limitations of the power of the President and his responsibilities I ran across a reference to the only suit, so far as I know, which has ever been brought against a President to recover personal damages for an official act as a tort. It was the suit of Edward Livingston against Thomas Jefferson. The exceptional character of the action led me on to the story of its origin, and then into the very romantic and remarkable life of the plaintiff in that action. I have no doubt that all the incidents that my reading and investigation developed were well known in the politics of one hundred years ago, but a century dims much that it would seem never could be forgotten. At the risk, therefore, of reciting what may be well known to many of my auditors, I thought I would take for my subject tonight some of the chapters in the life of a very able and brilliant lawyer, in which he came into relations, friendly and otherwise, with such men as Thomas Jefferson, John Marshall, and Andrew Jackson.

Edward Livingston was one of the Livingstons of New York. He was born in one of the Livingston manors on the Hudson, the youngest of a large family. Robert Livingston, the Chancellor of New York, the First Foreign Secretary of the United States under the Confederation, and the Minister to France who negotiated the Louisiana Treaty with Napoleon, was his elder brother. His sister married General Montgomery, who fell at Quebec. Edward was born in 1764, and graduated at Princeton at the age of seventeen in 1781. He studied law at Albany in the office of Chancellor Lansing, and James Kent, Alexander Hamilton and Aaron Burr were his intimate fellow students. He was strongly attracted to the civil law, and gave much attention to its study. He understood French, Spanish, and German, and spoke French fluently and clearly. He began the practice of law in New York, and soon acquired a high reputation as a lawyer. Mr. Livingston was a lover of literature and poetry, and was an orator with most fluent and felicitous diction. He was greatly interested, however, in politics, and had strong Republican leanings. He was elected to the Fourth Congress in 1794,

again in 1796, and again in 1798. He was an earnest supporter of Jefferson. When Congress was presenting an address to Washington on the occasion of his retirement two of the small minority of Congressmen who objected to certain parts of that address and refused to make the vote unanimous were Andrew Jackson and Edward Livingston, a circumstance that many years after probably made easy the intimate association into which these two men came. Mr. Livingston afterwards explained, in testifying to his great admiration for Washington, that he did not object to the praise of the man, but he thought the approval of his administration in the resolutions was unmeasured. It was Mr. Livingston who moved the resolution requesting President Washington to submit to the House of Representatives the correspondence between the State Department and Chief Justice Jay concerning the negotiations of the Jay Treaty. The President's refusal was based on the ground that the House of Representatives was not part of the treaty-making power, and its duty was merely to perform obligations which the Government was in honor bound to meet by reason of a treaty duly made and confirmed. You may remember that the House of Representatives then passed the Blunt resolution, asserting that in all matters requiring the action of the House to perform the obligations of a treaty, the House had a right to be consulted. In President Adams's administration Mr. Livingston moved resolutions which criticised severely President Adams's conduct extraditing to England one Robbins, an Irishman, charged with murder on an English ship on the high seas, who had escaped to South Carolina, where he was arrested. President Adams wrote to the United States Judge, giving it as his opinion that the charge of piracy against the accused could not be sustained, and saying that if the judge found the facts charged to be probably true he would issue his warrant of extradition in response to a request from the British Government. The judge agreed with the President, that the offense was not piracy, and found there was probable cause for the charge of murder. Robbins was delivered to the British agent, taken to England, indicted, tried, and hung. The Jay Treaty provided for extradition for each country to the other of fugitives charged with murder and other crime, but in view of the unpopularity of the treaty Congress had passed no act providing the usual statutory machinery for effecting such extradition. The resolutions charged the President in this case with unduly interfering with the judicial branch of the Government and with violating the rights of Robbins by such executive exercise of power.

John Marshall was a member of the same Congress. Livingston and Gallatin both spoke in support of the resolutions, and Marshall answered.

Marshall's answer is one of the most convincing and able legal arguments ever made. It is reported that Gallatin took notes of Marshall's argument for a time, and then threw away his memoranda. He was asked whether he was going to reply to Marshall, and he said he had intended to do so, but that his argument was unanswerable. Marshall demonstrated that under the constitutional duty imposed upon the President of taking care that the laws be faithfully executed, and the provision of the Constitution peculiar to our country that treaties are laws whenever they contain language mandatory and not promissory, it was not only the power but it was the peculiar function of the President to perform the obligation of the Government and deliver over this accused person who came within the letter and the spirit of the written obligation for extradition. The argument was subsequently published in the 5th Wheaton, United States Supreme Court Reports, Appendix, page 1. One hundred years later Mr. Justice Gray, speaking for the Supreme Court, cited this argument of Marshall as a conclusive demonstration of the power of the President in the execution of treaties as the law of the United States.

Upon his retirement from Congress, at the end of Adams's administration and the beginning of Mr. Jefferson's, Mr. Livingston was appointed by Mr. Jefferson to be United States District Attorney for New York. At the same time Governor George Clinton appointed him to be mayor of the city of New York. Such pluralism would not be permitted now, but in those days it did not evoke public criticism. Mr. Livingston held both offices for nearly three years. Then something occurred which colored his whole life, and which revealed in him a defect of character that followed him throughout his great career and added much to his disappointment and sorrows. An epidemic of yellow fever broke out in New York. Mr. Livingston was most active in his efforts to stamp out the disease and to aid those of the people who were stricken. He contracted the disease himself, but after a severe illness recovered from it. While engaged in his works of relief a Government agent from Washington visited his office as District Attorney and examined his accounts. In those days the United States Attorney collected funds for the Government and retained large sums on deposit. The examiner found that Mr. Livingston was short in his accounts, and first reported the deficit as reaching $100,000. A subsequent audit reduced it, however, to $40,000. The deficit was due in part at least to the embezzlement of a trusted clerk, but there was much confusion in Mr. Livingston's financial affairs, and the defalcation grew out of a habit, which was inveterate with him, of free living beyond his means. Livingston at once deeded all his property to the Government of the

United States and resigned both offices. The citizens of New York, grateful to him for his great and efficient aid to them during the yellow fever crisis, petitioned him to withdraw his resignation, but he declined to change his purpose and immediately left for New Orleans, where he arrived in February, 1804, with $1,000 in his pocket, to begin life anew. He was then forty years of age. His first wife, by whom he had three children, had died in 1801. His children were too young to take with him to New Orleans, and leaving them with a sister he went alone. His love of the civil law and his familiarity with it, his knowledge of French and Spanish, and his belief that there was a greater opportunity to repair his fortunes in a new country that was bound to expand rapidly in population and prosperity, all induced this step. He soon established himself at the bar of New Orleans and came to the head of it. He framed a simple code of legal procedure to reconcile the previous civil law practice to the change of sovereignty from Spain and France to that of the United States and to the use of the trial by jury into their system, as required by the Constitution of the United States. Mr. Jefferson was evidently very distrustful of Livingston because of his defalcation in office under him, and also because he suspected Livingston of complicity with Aaron Burr. Indeed, General Wilkinson, who was the military commander in charge of New Orleans in 1806, charged Livingston with complicity in Burr's conspiracy. When Livingston appeared as counsel in a habeas corpus case to secure the release of Bollman, who had been arrested on a murder warrant, Livingston successfully refuted the charge upon the spot and no proceedings were begun against him. But all these circumstances aroused Jefferson's feelings against Livingston, and doubtless led him to the course which he took in the famous Batture controversy. That controversy it is now my purpose to describe.

Soon after Livingston began practice in Louisiana, he had as his client one John Graveer. Graveer had inherited a tract of land fronting on the Mississippi River just outside of New Orleans. Against this land, and outside of and at the foot of the levee, the river had formed a sand bank, an alluvial deposit called in French a "batture." Graveer at times had dealt with the batture as the owner and fenced in part of it. At the same time, however, the citizens of New Orleans had used it as a common and had drawn sand and dirt from it to build levees. Livingston examined the title, saw the value the land would have as the city grew, and bought part of the batture from Graveer. The city objected to the claim of ownership, and Livingston brought an action in the territorial court against the city of New Orleans to establish his title, which in 1807 resulted in a final decision in his favor. He then

proceeded to improve the batture. He built a canal about 250 feet long right through the batture to the river, and he erected a house on the land. The batture, of course, was beyond the regular levee. His plan was to extend the levee around the batture, as had been done in other cases, and thus bring the batture inside of the levee where it could be better availed of. While he was engaged in this enterprise his workmen were driven off by the people of New Orleans, who denounced the decision of the court. The territorial governor, Claiborne, sought to restrain the rioters, and agreed to submit the matter to Washington. When this was done the question was considered by Jefferson and submitted to the Attorney-General, who rendered an opinion that this batture belonged to the United States, because it had belonged to France and had been conveyed by treaty to the United States. Jefferson thereupon issued a warrant to the marshal directing him to put all intruders off of this St. Mary's Batture, as it was known, using United States military forces if necessary. When Livingston heard of this he applied to the territorial court, who had given him judgment, for an injunction to prevent the action of the marshal, and the injunction was issued. But the marshal, ignoring the injunction, called on a *posse comitatus* to assist him to take possession of the batture. Livingston was thus summarily deprived of any opportunity to continue his improvement or to enjoy his property. Livingston then applied to the President, who would not hear him. He applied to Congress, and successive Congresses, who gave no ear to his complaint. Finally, exhausting all other remedies, he brought a suit against Thomas Jefferson, the individual, in the Circuit Court of the United States of Virginia, after Jefferson had retired from the Presidency, in which he sought to recover heavy damages for trespass on his land. The case came before the Circuit Court, Chief Justice Marshall presiding, and District Judge John Tyler, the father of President Tyler, sitting on the bench with him. Mr. Jefferson's counsel first moved that the plaintiff be compelled to give security of costs. When this had been satisfied a demurrer was filed to the jurisdiction of the court on the ground that trespass upon real estate was an action which could only be tried in a jurisdiction where the land was. This question was heard and evidently considered with care by the Chief Justice and Judge Tyler, and both pronounced opinions. The Chief Justice referred to a decision of Lord Mansfield in which it was held that such a suit could be brought in another jurisdiction, but in spite of the great authority of that name the Chief Justice was with some reluctance apparently obliged to hold that the weight of authority was against the exercise of jurisdiction in Virginia over a trespass of land in Louisiana, and so dismissed the action. Livingston had also brought

suit against the marshal in Louisiana. Though he won the suit in the lower court he lost it on appeal by a divided court, not on the question of title, but on the ground that the marshal was not personally liable for acting on the President's warrant. Many years after he did secure some compensation which was not adequate to the loss he had sustained, and which was the result of compromise. This batture controversy had attracted the attention of the jurists and politicians of the United States, and Mr. Jefferson had been criticised by Chancellor Kent and others for what was regarded as his arbitrary and high-handed course.

In a letter of Marshall to Story referring to some severe denunciation of the Federal judiciary by Jefferson, which was frequent with him, Marshall said: "He cannot forget Marbury and Madison or the batture."

To meet these criticisms, after the decision in the Virginia case, Mr. Jefferson published what he entitled "The Proceedings of the Government of the United States in Maintaining to the Public the Beach of the Mississippi Adjacent to New Orleans Against the Intrusion of Edward Livingston, Prepared for the Use of Counsel by Thomas Jefferson." It was first printed in New York in 1812, and then later republished in Hall's American Law Journal, volume 5, in 1814. Mr. Jefferson's statement began as follows:

"Edward Livingston, of the territory of Orleans, having taken possession of the beach of the river Mississippi adjacent to the city of New Orleans, in defiance of the general right of the nation to the property and use of the beaches and beds of their rivers, it became my duty, as charged with the preservation of the public property, to remove the intrusion, and to maintain the citizens of the United States in their right to a common use of that beach. Instead of viewing this as a public act, and having recourse to those proceedings which are regularly provided for conflicting claims between the public and an individual, he chose to consider it as a private trespass committed on his freehold, by myself personally, and instituted against me, after my retirement from office, an action of trespass, in the circuit court of the United States for the district of Virginia. Being requested by my counsel to furnish them with a statement of the facts of the case, as well as of my own ideas of the questions of right, I proceeded to make such a statement, fully as to facts, but briefly and generally as to the questions of right. In the progress of the work, however, I found myself drawn insensibly into details, and finally concluded to meet the questions generally which the case would present, and to expose the weakness of the plaintiff's pretentions, in addition to the strength of the public right. * * * I passed over the question of jurisdiction, because that was one of ordinary occurrence, and its limitations well ascertained. On this, in event, the case was dismissed; the court being of opinion that they could not decide a question of title to lands not within their district. My wish had rather been for a full investigation of the merits at the bar, that the public might learn, in that way, that their servants had

done nothing but what the laws had authorized and required them to do. Precluded now from this mode of justification, I adopt that of publishing what was meant originally for the private eye of counsel."

Jefferson's statement covers 115 pages. He was answered by Mr. Livingston in 175 pages. Mr. Livingston opens his answer as follows:

"When a public functionary abuses his power by any act which bears on the community, his conduct excites attention, provokes popular resentment, and seldom fails to receive the punishment it merits. Should an individual be chosen for the victim, little sympathy is created for his sufferings, if the interest of all is supposed to be promoted by the ruin of one. The gloss of zeal for the public is therefore always spread over acts of oppression, and the people are sometimes made to consider that as a brilliant exertion of energy in their favor, which, when viewed in its true light, would be found a fatal blow to their rights.

"In no government is this effect so easily produced as in a free republic: party spirit, inseparable from its existence, there aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause for acts that would make a tyrant tremble on his throne. This evil must exist in a degree; it is founded in the natural course of human passions—but in a wise and enlightened nation it will be restrained—and the consciousness that it must exist will make such a people more watchful to prevent its abuse. These reflections occur to one whose property, without trial or any of the forms of law, has been violently seized by the first magistrate of the Union—who has hitherto vainly solicited an inquiry into his title, who has seen the conduct of his oppressor excused or applauded, and who, in the book he is now about to examine, finds an attempt openly to justify that conduct upon principles as dangerous as the act was illegal and unjust."

I have read both Mr. Jefferson's suggestions and Mr. Livingston's answer, and they are well worth reading. Mr. Jefferson's suggestions are a labored defense of what seems to me to have been a plainly indefensible action. He sought, first, to show that Livingston did not have the title to the land from which he ousted him, but that it was in some third person—an utterly insufficient defense, because Mr. Jefferson's act could not rest for justification on the title of some other person but only on the title of the United States. In asserting the title of the United States he proceeded, with an industry most commendable in a better cause, to quote from the law of France and Spain on the subject of "alluvial increases to river banks," and to show that the title of the batture was in France and passed from France to the United States. The answer of Mr. Livingston was, as that staid old authority, the British Encyclopedia, says, "a crushing one." It left Mr. Jefferson no place to stand upon either in his argument that the batture belonged to the United States or in his claim that under the act of Congress he was

entitled to remove squatters from Government property. The statute plainly had no relation to one who had acquired his title before its passage, or indeed to one who had a title such as Livingston had sustained by the decree of a competent court, even though that decree was not binding upon the United States as a party to it. The trenchant style, the satire and the irony and the invective of Livingston must be read to be appreciated. One can well understand how Chancellor Kent could write to Livingston felicitating him on the complete demonstration of his right and Mr. Jefferson's wrong. I admire Thomas Jefferson as a genius in many ways, as a patriot, a real Democrat, a promoter of education, the founder of the University of Virginia, and a great statesman and politician, but he does not appear at his best in this batture controversy. The special pleading of which he is guilty, the inconsistencies of the positions that he takes, his disingenuous citations, leaving out important additions that would change the effect of the citation as authority are all brought out by Mr. Livingston with clearness and force and with a sincere indignation that manifested itself sometimes in the keenest ridicule and at other times in the most eloquent invective. He closed his answer as follows:

"I now take my leave of Mr. Jefferson. In my answer, I have confined myself to his book. Notwithstanding the strong temptations which assailed me almost in every page, I have strictly kept within the boundaries of a just (and, I think, considering the wanton attack) a mild defense. My future conduct will depend much on that of my adversary. I shall continue to reply to every argument that may be addressed to the public on this subject. Knowing that my cause is good, I do not despair even with humble pretensions, to make its justice appear. For this purpose I have always courted investigation; I should have preferred it in a court of justice, but do not decline it before the public.

"Though some may condemn me only on hearing the name of my opponent, there are many, very many in the nation, who have independence enough to judge for themselves, and the ability to decide with correctness—to such I submit the merits of a controversy which has been rendered interesting as well from the constitutional as the legal questions it involves, and on which Mr. Jefferson has, by his management of it, staked his legal, his political, and almost his moral reputation. That he should not have understood the nature of my title and the different foreign codes on which it depends, is no reproach; that he should have acted at all without this knowledge, must surprise—that he should have acted forcibly, must astonish us, but, that he should persevere in the same pretense of understanding the laws of France better than gentlemen bred to it from their childhood, and who, engaged on the same side of the controversy with himself, have abandoned the ground he has taken, that he should obstinately justify an invasion of private property, in a manner that puts it in the power of a president with impunity to commit acts of oppression at which a king would tremble—that he should do all this and still talk of conscious rectitude, must amaze all those who look

only to the reputation he has enjoyed, and who do not consider the inconsistency of human nature, and the deplorable effects of an inordinate passion for popularity."

So far as I know, Mr. Jefferson made no further answer. Indeed it would have been difficult for him to do so.

After Livingston had prepared his Criminal Code for Louisiana, which gave him deserved and worldwide fame as one of the great lawgivers of modern times, and of which I shall say something later, he sent it to Mr. Jefferson for suggestions. Mr. Jefferson pleaded his great age and his inability to comment upon the Code as it deserved, but he said:

"I have attended to so much of your work as has heretofore been laid before the public, and have looked with some attention also into what you have now sent me. It will certainly arrange your name with the sages of antiquity."

And he closes a long letter with this expression: "Wishing anxiously that your great work may obtain complete success and become an example for the imitation and improvement of other States, I pray you to be assured of my unabated friendship and respect."

Ten years after Jefferson's death Livingston appeared as senior counsel for the city in the case of *New Orleans v. the United States,* argued and decided in the Supreme Court of the United States in 1836 and reported in 10th Peters, 662. The question in the case was unlike that in the Batture case. The city of New Orleans had extended its streets across what was really a batture down to the river. The tract had been gradually enclosed within the extended levee. The issue was whether the United States by transfer from France and Spain had not acquired such a right in this open space as to prevent the city from extending its streets through it. Mr. Webster was associated with Mr. Livingston in representing the city and Benjamin F. Butler, Attorney-General of the United States, represented the Government. In the course of the argument, Mr. Butler referred a number of times to Mr. Livingston's answer to Mr. Jefferson and commended the accuracy and lucidity of his dealing with certain of the issues arising in the case then under argument. When Mr. Livingston came to reply he used this language, which will be found on page 691 of 10th Peters:

"The reference to the pamphlet, from which the argument has been drawn; the flattering terms in which the attorney-general has been pleased to speak of it; and the possibility that, in looking at it, the court may recur to other parts than those immediately relating to the question before them, oblige me to ask their indulgence for a single observation; irrelevant, it is true, to the case, but which I am happy to find an opportunity of making. The pamphlet was

written under circumstances in which the author thought and still thinks, he had suffered grievious wrongs; wrongs which he thought, and still thinks, justified the warmth of language in which some parts of his arguments are couched; but which his respect for the public and private character of his opponent always obliged him to regret that he had been forced to use. He is happy, however, to say, that at a subsequent period, the friendly intercourse with which, prior to that breach, he had been honored, was renewed; that the offended party forgot the injury; and that the other performed the more difficult task (if the maxim of a celebrated French author is true) of forgiving the man upon whom he had inflicted it. The court, I hope, will excuse this personal digression; but I could not avoid using this occasion of making known that I have been spared the lasting regret of reflecting that Jefferson had descended to the grave with a feeling of ill will towards me."

The case was decided in favor of the city of New Orleans and against the United States. In leaving the Batture case I should say that Livingston bought his interest in it originally with the hope that its increase in value would enable him to pay off his debt to the United States growing out of the defalcation as District Attorney of New York. He had confessed judgment for more than $100,000 and had surrendered all his then property to satisfy as much as it would. The batture followed him for many years of his life, and while he lived was a liability and drained his pocket and his strength. He did settle his debt with the United States, however, principal and interest, the interest amounting to more than the principal. When Jackson sent his name to the Senate as Secretary of State, Clay moved a scrutiny of the settlement of Livingston with the Government. He was induced to withdraw the motion on Senator Dallas's assurance of its entirely honorable character, but this did not prevent Clay in subsequent attacks upon Jackson from classing Livingston with notorious defaulters in the Government.

There remains for me to say something of Livingston's relations to Andrew Jackson and of the Code upon which rests his chief right to rank among the really great. In 1814 the English were threatening the territory of the United States along the gulf, and General Jackson, stationed at Mobile, was taking measures to meet them. The English hoped that the French and Spanish creoles, with whom the transfer of Louisiana had not been very popular, might be induced to welcome them and side with them. There were other elements, too, in the community, whose loyalty was uncertain. There were the free persons of color, and there were the slaves. Livingston, who had become the acknowledged leader of the bar of New Orleans, was much concerned, and was active in seeking to arouse all the people to the necessity of measures for defense. Having married a French lady a year after he came to Louisiana, for his second wife, he was popular with the French and was effective

in enlisting their support. Having known Jackson through his association with him in Congress, to which I have already referred, Jackson was glad to avail himself of his services. Jackson, when he came to New Orleans to look the ground over, dined with Livingston the first evening, and soon thereafter appointed him as a volunteer aid. Livingston was very active before and during the Battle of New Orleans. He exposed himself in his duties many times, and his courage and effectiveness called forth the warm approval of Jackson, who gave him his portrait with a most commendatory inscription. The artist was French and gave Jackson a much more Napoleonic cast of countenance than Jackson's other portraits led us to think he had. Livingston continued to serve Jackson until he left New Orleans. He interpreted Jackson's addresses to the French and he lent him his aid in every way by advice and activity.

Livingston was a man of sweet disposition, charming manner and great goodness of heart, but the historians refer to him in a way that indicates that his reputation in Louisiana for probity was not unquestioned. Professor Bassett, in his life of Andrew Jackson, speaks of Livingston as a lawyer of "talent, but not too scrupulous." Gayarre, in his history of Louisiana, refers to him as the first lawyer of New Orleans, but "of supposed rapacity." It is to be presumed that the story of his defalcation had followed him to New Orleans, and it is quite evident that he had encountered much criticism of the people of New Orleans in his effort to possess himself of the batture. Moreover, in the zeal of his advocacy, he had incurred enmities and aroused criticism in which there was some element of justice. All his life long he contracted debts and did not pay them promptly.

For four or five years before the Battle of New Orleans a band of men who called themselves privateers and who preyed upon Spanish vessels had their headquarters on an island in one of the bayous west of the mouth of the Mississippi called "Barrataria." The island was the island of Grande Terre. They first claimed their commission as privateers from the French island of Guadaloupe, and when that was captured by the English they solicited and obtained a commission from a newly established republic of Cartagena, claiming independence from Spain. They carried on a very lucrative business of defrauding the enemies of the United States by smuggling the merchandise plundered from Spanish merchantmen into New Orleans. Their sale of these smuggled goods was open and almost defiant. The people from New Orleans, many of them, connived at it and bought the articles sold, although Claiborne protested and besought the Legislature of the State in vain for aid to suppress this lawlessness. Finally a naval expedition of the United

States Government broke up their settlement at Grande Terre and captured one of the two brothers Lafitte, who were the leaders. Professor Bassett says that Livingston represented them as counsel. Whether this representation was after only some of them had been captured and imprisoned in New Orleans, and he was merely appearing in their defense, or whether it had been maintained earlier pending their illicit business career, of which there is some intimation, does not distinctly appear.

In spite of the successful naval expedition against them, the Barratarians seemed to have returned to Grande Terre whence they had fled, and there under Jean Lafitte resumed operations. While there in 1814 a British war vessel came to Barrataria Bay, and the British Admiral in command in the Gulf offered Lafitte a commission in the English Navy and a large sum of money if he and his men would join their forces. Lafitte sent the communications to a friend in New Orleans to be presented to the authorities. His brother was still in prison. When this became known, Jackson in issuing a proclamation to the people referred with scorn to the fact that the English sought to associate themselves with "pirates, and robbers and hellish banditti." Afterwards, however, he was glad to accept their services in defense of New Orleans, and in his general orders after the battle referred to them as gentlemen and privateers, with great commendation of their courage and valor. After the battle Jackson continued the martial law when the necessity for it had ceased, and issued an order sending the French aliens out of the city. A French naturalized citizen published a letter in which he criticised this order severely. Jackson had him arrested and committed to jail. Hall, who was the United States District Judge, issued a writ of habeas corpus to inquire into the legality of this arrest. Jackson thereupon arrested the United States Judge and confined him. After the news of peace came martial law was suspended, and Judge Hall, at the instance of the District Attorney, cited Jackson for contempt. Jackson attempted to answer, but the court declined to hear him and fined him $1,000, which he paid. It is suggested, though without direct proof, that Livingston was Jackson's adviser in this illegal course, but it is difficult to believe that Livingston, with his accurate knowledge of the law, could have allowed himself to give such advice. It is established, however, that Livingston drafted the answer which Jackson attempted to make to the proceeding instituted against him in Judge Hall's court for contempt. It is noteworthy that the Barratarians were present when he was summoned for contempt, and proposed to throw the judge into the river, but Jackson repressed any such lawlessness, submitted to the jurisdiction of the court, and paid the fine. Subsequently he threatened to secure impeachment proceedings against Judge Hall, but wisely allowed the matter to drop.

Livingston had not succeeded financially. His expenses were heavy. As already said, the time that he had consumed on the Batture controversy and the money expended were a loss, and the debt which he had confessed judgment for to the Government still hung over him. His affection for his wife and children was very tender. He had suffered great grief in the loss first of a daughter and then of a son, neither of whom he was able to see as much as he would. His letters to his son are full of affection, wise advice, and may be compared in some ways with the letters of Lord Chesterfield to his son. The beauty, fluency, terseness, wit and humor of his style make the reading of anything that he wrote most delightful. He was a man evidently of the kindest feeling, anxious to please, anxious to help, a man of high ideals, if one can judge by his expressions, but always belabored by financial burdens, due to his lack of economy and business sense. The lady whom he married for his second wife had herself had a romantic life. She was the daughter of a French noble family which had migrated from France to San Domingo, and had acquired great wealth and constructed a marble palace on the sea and surrounded themselves with hundreds of slaves, a great plantation, and a most luxurious environment. The revolt of the negroes in the island drove the family to New Orleans. Mrs. Livingston was a widow of not more than twenty when Mr. Livingston married her. She had married for the first time at the age of thirteen, had lost three children and her husband, and had returned to her father's house. In her escape from San Domingo with her younger sister by a British warship she saw her grandmother, who was in her party, killed by a bullet of one of the revolting negroes. She was a very beautiful woman, a woman of great culture, wide reading, and a real helpmeet of Livingston in his political career thereafter. He always kept open house in New Orleans, Washington, and Paris, and Mrs. Livingston presided in his home with a grace and charm and distinction that all the statesmen of the day noted.

From his earliest experience in Congress, Livingston had manifested an interest in a reform of the criminal laws, and had moved a resolution for a revision of the criminal laws of the United States while he was still a representative in Congress from New York. He had an interest in the humanizing of the criminal laws and the punishment of criminals as deep and earnest as that of Romilly or Howard. In 1821 the Legislature of Louisiana elected him to revise the entire system of criminal law of the State. He was admirably fitted to do this. He had a profound understanding of jurisprudence and the widest knowledge of the codes of the various legal systems of the world, especially the common law, the Roman law, the civil law, the Spanish Code, and the Code Napoleon. He had a fluency in felicitous, accurate, lucid, terse but com-

prehensive expression that was remarkable and supplied just what was needed in a lawgiver. With the most absorbing industry he devoted his attention to the preparation of what was certainly an *"opus magnum."* He called his work a penal system consisting of four codes, a code defining crimes, a code of criminal procedure, a code of evidence, a code of prison reform, with an appendix of definitions. He wrote in his report to the Legislature a volume of explanation and argument to justify each code which he had prepared. After he had devoted three years to this labor and had prepared the manuscript for the printer he suffered the unusual misfortune of having his entire manuscript, of which he had no copy, destroyed by fire. But so clearly defined in his mind had his work become that in two years more he was able to reproduce both the code and his argument for it and his explanation. No one can read, even in a cursory way, as I have done, the plan of the code, his explanations of it, and the style of the various sections of it, without joining the world of his time in profound admiration for his work. It gave him a reputation abroad as a jurist on the continent certainly equaling that of either Story, Marshall, or Kent. He was made a member of the institutes of many countries, notably that of France, and the great American lawyers all pronounced encomiums upon his work. Bentham, the great English philosopher and law reformer, was most pronounced in his praise of the work.

Livingston was fifty years ahead of his day in the liberality of his enlightened provisions for punishment. In the preamble of the Code he proposed, was this:

"Vengeance is unknown to the law. The only object of punishment is to prevent the commission of offenses; it should be calculated to operate: First, on the delinquent, so as by seclusion to deprive him of the present means, and by habits of industry and temperance, of any future desire to repeat the offense.

"Secondly, on the rest of the community, so as to deter them by the example, from a like contravention of the laws. No punishments greater than are necessary to effect these ends, ought to be inflicted. No acts or omissions should be declared to be offenses, but such as are injurious to the State, to societies permitted by the law, or to individuals.

"But penal laws should not be multiplied without evident necessity; therefore acts, although injurious to individuals or societies, should not be made liable to public prosecution, when they may be sufficiently repressed by private suit."

Again:

"Penal laws should be written in plain language, clearly and unequivocally expressed, that they may neither be misunderstood nor perverted; they should be so concise, as to be remembered with ease; and all technical phrases, or words they contain, should be clearly defined. They should be promulgated in such a manner as to force a knowledge of their provisions upon the people;

to this end they should not only be published, but taught in the schools; and publicly read on stated occasions.

"The law should never command more than it can enforce. Therefore, whenever, from public opinion, or any other cause, a penal law cannot be carried into execution, it should be repealed."

He was very much opposed to capital punishment, and made the punishment hard labor for life. He was very anxious to prevent contamination of criminals by association, and he provided for a separate confinement of prisoners. He divided them into classes. Those under eighteen he sent to one prison of reform and those above eighteen to another. He provided vocational education for the younger class. Modern penologists may not agree with all his ideas, but the liberality of his purpose and the general practical details that he inserted in his Code are quite wonderful in view of the conditions that then prevailed.

It is not surprising, in view of this work, that Sir Henry Main, himself a great expounder of law, spoke of Livingston "as the first legal genius of modern times." The Legislature of Louisiana was not sufficiently progressive and courageous to adopt his code, but many States have borrowed from it. His code of reform and prison discipline was adopted by Guatemala. When a World Congress of Prison Reform was about to be held in Europe a new edition of his works on the criminal law, including this code and one prepared by him while in Congress for the United States, was published with an introduction by Chief Justice Chase, who speaks in highest commendation of Livingston as a world reformer in this field. After the completion of his criminal code he was appointed on a committee to draft a civil code of Louisiana, which the Legislature for the most part adopted in 1825. The most important chapters of this, including all those on contracts, were prepared by Livingston alone.

Livingston was elected to Congress and represented Louisiana from 1823 to 1829. Because of his duties in Congress he did not return to Louisiana to seek a reëlection, and probably because of his absence he was defeated. But the Legislature of Louisiana thereupon elected him to the Senate, and he entered that body with Jackson's inauguration as President and served there. He was offered the mission to France by President Jackson after he had been elected to the Senate, but he felt obliged for financial reasons to decline. As already said, he was one of Jackson's intimate friends, and was perhaps one of the first to propose to him that he should be a candidate for the Presidency. After Van Buren retired from the State Department under Jackson, Livingston was invited to succeed him, and with some hesitation he accepted.

During Livingston's service in Jackson's Cabinet the controversy arose between the Government of the United States and the State of South

Carolina over the enforcement of the customs laws of the United States, and the Legislature of South Carolina passed its nullification ordinances. Livingston, as Secretary of State, wrote the proclamation which Jackson issued to the people of South Carolina and to the people of the United States on the subject of nullification. It is an admirable document, and, as has been truly said, it argues the case against nullification with all the charm, force and style of John Marshall. The vigor of the assertion of National power was so great that some of Jackson's friends were troubled over what they called the "Metaphysics of the Montesque of the Cabinet."

Jackson was very fond of Livingston, but, as the correspondence shows, he did not have the profoundest confidence in his political judgment. He spoke of him during his incumbency as Secretary of State as a polished scholar, an able writer, and a most excellent man, but he said "he knows nothing of mankind, and he lacks Van Buren's judgment." He also referred to the fact that his memory was then somewhat failing him.

In the controversy with the United States Bank and Jackson's determination to remove the deposits, Livingston was not in full sympathy with him and tried to effect a settlement and compromise between the contending parties; but he failed. Jackson then renewed the offer to Livingston which he had made him at the beginning of his administration, that of the post of Minister to France. The post, always honorable and important, was especially so at this time when an issue was pending as to the payment by France of what were known as the French spoliation claims, which France had agreed to pay, but failed to appropriate the money for. Louis Philippe was then King of the French and found difficulty in persuading the French Assembly to make the appropriations. Livingston accepted the offer, left the Cabinet and went to France. In his usual state of pecuniary distress he borrowed $18,000 from the United States Bank. In view of the strained relations between Jackson and the bank, which Livingston sought to relieve by a compromise, the acceptance of such a favor from the bank scandalized his friends.

Livingston's life in France as Minister, of course, was full of delight. He and his wife came into close relationship with Lafayette, who was still living and had been a bosom friend of Livingston's family. As an Associate Member of the French Institute, life in Paris was all he could desire. He succeeded after much effort in securing an appropriation by the French Assembly of the money due under the treaty, but it was accompanied by a condition that President Jackson should withdraw certain strictures that he had made upon the French Government in a

message to Congress. The result was that ultimately Livingston asked for his passports and returned to the United States, where he was received with great warmth. The matter was settled by the mediation of England, the money was paid, and a construction which General Jackson put upon his message was held by the French to be an explanation. Livingston wished to return to France, and intimated his willingness to do so to Jackson, but Jackson appointed Cass. Livingston retired to the estate which had been left him on the Hudson by his sister, Mrs. Montgomery, and there lived out the few years of his life remaining.

This is the career of a great jurist and lawgiver. There are few lives in our history more replete with unusual and romantic incidents, with variety of experience, with great constructive and useful work. His close association with the other great men of the country doubles one's interest in him. His fame was greater abroad than at home. While we reluctantly confess that he had weaknesses, we would forget it in the light of his genius and his heart. A study of his personality charms. His broad sympathies awaken affection. The great code of enduring usefulness which he left to his countrymen and the world commands our grateful admiration.

The President and the Presidency

BY L. AMES BROWN.

I.

It is much too early yet for us to attempt to estimate Mr. Wilson as an historical figure. We are too near him for that and our perception is too subject to the feelings which have been aroused by his policies and the events of the times. Nevertheless, the business of assessment and review may not be altogether unprofitable now that Mr. Wilson's first administration is drawing towards its end; nor can we fail to render service by careful efforts to ascertain the essential features of the very individual part he has played in our affairs. Fortunately, we have standards which are sufficiently clear to make feasible an effort to gauge the importance of those aspects of his work which have affected the character of the office he has held. So our task is by no means hopeless when we essay to find out how the Presidency has been shaped or moulded by Mr. Wilson.

Mr. Wilson throughout his long application to the study of our government has been a severe critic of what he terms the Newtonian theory, which would require a strict adherence to the limitations and checks imposed by the Constitution; he has consistently upheld the view that the spirit of the Constitution is capable of being stretched as the Nation grows, and has regarded our fundamental law as a plastic thing designed to accommodate itself to the changing life of the people. As recently as 1913 Mr. Wilson observed that "the character of the Presidency is passing through a transitional state." "We know what the office is now," he said, "and what use must be made of it; but we do not know what it is going to work out into." He added that "the present position of the Presidency in our actual system, as we use it, is quite abnormal and must lead eventually to something very different." What has Mr. Wilson contributed toward the correction of the abnormalities he so recently observed? How has he facilitated the transitions which he deemed so desirable? The answers lie in the record which all of us have studied with unusual care as it unfolded, because of our tremendous concern in it.

II.

President Wilson's relations with Congress constitute the most interesting chapter of our study, in so far as interest depends on new developments. The President's conception of his prerogatives at the south

end of Pennsylvania Avenue has created a stir more than once among those members of the National Legislature who stand for precedent and the established order. That Mr. Wilson would be exceedingly "progressive" in his relations with Congress was foreshadowed a few weeks before his inauguration March 4, 1913, when Mr. Samuel G. Blythe announced in the *Saturday Evening Post* that the President would personally address joint sessions of the House and Senate instead of transmitting long messages from the White House to be read separately in each assemblage. The National Capital seethed with comment, some of it caustic, as soon as the *Saturday Evening Post* article was read. I remember that the incident occurred soon after it had become known that Mr. Wilson had turned down an invitation to join the fashionable Chevy Chase Club, and that the two incidents coming so close together served to develop the opinion among Washingtonians content with Washington as it then was that they had a Tartar on their hands.

The President verified Mr. Blythe's announcement at the first opportunity. As soon as he was fairly settled in the White House he called a special session of Congress to revise the tariff in accordance with Democratic pledges; and when Congress met he arranged for a joint session in the hall of the House of Representatives to listen to an address from the President. Announcement of the President's intention to address the Congress brought a great crowd to the Capitol. The demand for seats in the House galleries was greater than at any time since the Spanish-American war. With characteristic promptness, President Wilson stepped into his automobile at the White House just eight minutes before 1 o'clock, the hour at which he had asked the two Houses to meet. Coolly and naturally he drove to the Capitol, accompanied by his private secretary, who carried a packet of half sheets of note paper upon which the message had been printed. With every appearance of naturalness, he proceeded to the House side of the Capitol and to the Speaker's office. There he met a committee of the House and Senate, who were very much ill at ease, and permitted himself to be escorted onto the floor.

The President's reading of his message and his announced intention to make it customary provoked a discussion of the general subject of the relationship between the Capitol and the White House. The Capitol began to buzz. Such sticklers for custom as Senator Lodge talked freely. Their interviews related to the precedents against the President appearing in person to deliver his message, and brought out the information that while Washington and Jefferson had resorted to the practice it had gone out with the latter and no later President before Mr. Wilson had revived it. Other Senators pointed out that there had been a purpose

in the minds of the fathers of the Government in establishing the Capitol Building and the President's residence at opposite ends of Washington's broad thoroughfare. I remember well, too, the pleasure which the late Senator Bacon of Georgia, chairman of the Senate Committee on Foreign Relations, seemed to take in calling attention to a passage in the diary of Senator McClay of Pennsylvania who told of the displeasure aroused when General Washington sought to participate in an executive session of the Senate to defend a proposed Indian treaty. The scene was so stormy, according to McClay, that President Washington absented himself from the executive session never to attempt another visit.

These little outbursts did not serve to deter Mr. Wilson from trying out another plan which he had in mind for acquiring greater influence with the Congress. He recalled that there was a President's room just outside the ante-chamber of the Senate. He conceived that this room might be used to greater advantage than had been derived from it by his predecessors, who simply visited it on the last night of each session of Congress to sign bills. The President decided to use the room for conferences on pending legislation with members of both Houses of Congress. He did appear there a few weeks after his first address to the Congress and conferred on several measures then in process of formulation. The stir which followed was even greater than his address had aroused. The precedent broken was one even more highly revered. It was an invasion of the sanctum of the Senate. Most of the Senators openly resented it.

As we study these developments, however, in the light of four years experience we see that their significance was overestimated at the time. Both visits to the Capitol were designed to get the country's ear for the President, and they served him no further. Of course, when he overturned a precedent, properly announcing his intention to do so in advance, and appeared before a joint session of the Congress, he not only assured himself of the undivided attention of each legislator, but he had every thoughtful citizen in the country hanging on his words. It was just what he desired, and all that he got.

The House listened, unawed but interested. It was not so difficult for Mr. Wilson's message to hold their attention as had been the case with other Presidential messages. Mr. Wilson's was the length of a short speech, whereas, dealing trenchantly with broad aspects of policy, each of Mr. Taft's annual messages was a great compendium of detailed statements which were furnished by the heads of Federal departments. These messages used to be written by Cabinet officers and assistant Cabinet officers as well, and I know at least one newspaper correspondent in

Washington who had the honor to write a part of a message delivered by one of our recent Presidents. Of course, these long messages, which were read unintelligibly by the clerk of the House and the secretary of the Senate, were not listened to, and were not even read afterwards by many persons except students and newspaper editors.

Similarly, the President exerted no important new influence at the President's room at the Capitol which he did not have in his study at the White House. It was good advertisement for Woodrow Wilson, who stood in need of being humanized and definitely outlined in the public eye, and it was good advertisement for the measures which he discussed up there. But that was all. His arguments had no potency peculiar to the place, except that the Senators and Congressmen who were invited in felt flattered, and therefore were more accessible to the President's views. As a matter of fact, it can be said of both of these customs established by Mr. Wilson, that neither placed in his hands a surely effective instrumentality for swaying the Congress, nor assured him of a measure of influence greater than his own character established.

Mr. Wilson's most effective means of exerting his influence on Congress has been in White House conferences with the members of the House and Senate committees entrusted with the formulation of the measures which he desired to shape. It is hardly an exaggeration to say that the essentials of every important measure on which the record of the Democratic Congresses of the past four years was made were fixed in President Wilson's office at the White House. This was made apparent during the formulation of the Underwood-Simmons Tariff Law. The President had many conferences with Senator Simmons of North Carolina and Majority Leader Underwood of the House and with other members of the Ways and Means Committee of the House and the Finance Committee of the Senate. He deliberated with them as to the schedules of the law which would best fulfill Democratic pledges, sought their views, and subjected them to the closest scrutiny from every angle. Then he made up his own mind and proceeded to get his decision accepted by the Democratic leaders.

It chanced that no spectacular divergence of opinion arose until the wool and sugar schedules were taken up. The President was convinced that Secretary of State Bryan's views that sugar and wool ought to go upon the free list were correct. Majority Leader Underwood, on the other hand, held that the Democratic campaign pledge not to destroy any industry by its tariff revision should protect the sugar industry of Louisiana from the disasters of free trade, and that the necessities of competition did not demand that all the revenues derived from the tariff on wool should be abandoned. The President refused to recede

in either case, although he did permit himself to be persuaded by Democratic National Committeeman Robert Ewing, of Louisiana, that the Louisianians deserved a period in which to prepare themselves for the removal of all duties on sugar. Mr. Underwood surrendered his convictions to the President's for the sake of the party welfare, and so it may be said that President Wilson had a more important part in determining the character of the tariff law signed by him than had been given any recent President. His effective assertion of his own views contrasted strikingly with Mr. Cleveland's veto and with Mr. Taft's acceptance of Payne-Aldrich Law.

Formulation of the Currency Bill, the Anti-Trust Law, and the other important measures embodied in the record of achievement upon which the Democracy appealed to the country's favor in the recent election produced repetitions of the incidents surrounding the writing of the Tariff Bill. The Washington correspondents found that the "leads" of these stories often came from the White House, and that if the President's will could be ascertained the outcome was fairly certain.

The series of instances in which the President's will was sought to be inflicted upon Congress was climaxed in 1914, in his successful fight for the repeal of the provision of the Panama Canal Act exempting American shipping from the payment of tolls. A House of Representatives controlled by the Democrats had passed this exemption. The Democratic National Convention which nominated Mr. Wilson for the Presidency had adopted a platform committing the Democracy to the exemption. Mr. Wilson decreed from the White House, however, that the party position should be reversed and that the exemption should be repealed. This incident was unprecedented in the history of American politics since the advancement of the party system. The President did not make a full public explanation of his position. The reasons given in his message demanding the repeal were those relating to National honor and the necessity that America should not permit any question to arise about her willingness to abide by treaty obligations. Undoubtedly, Mr. Wilson had the conviction that the Hay-Pauncefote Treaty did obligate the United States to operate the canal without partiality to her own shipping. Another interesting consideration said to have been in his mind at the time touched the controversy then being carried on between the United States and Japan over the Alien Land Law of California. It was said that Great Britain, although Japan's ally, had signified to the United States that she would not support Japan in a war with the United States, provided the tolls exemption were repealed. That may or may not have been idle gossip, but it is a fact that Administration leaders in both Houses of Congress made effective use of hints

that grave complications in our foreign affairs might be avoided by the repeal. Some of the Administration workers did not scruple either at tactics more open to question than this. For instance, it was said that Congressman Kitchin of North Carolina, then slated to succeed Congressman Underwood as majority leader, was threatened by an Administration official with the President's opposition to his selection if he held out against the repeal. I may say in passing that the same report of the incident conveyed the information that Mr. Kitchin made just the defiant reply to this threat which his friends consider it deserved. It is believable, also, that the President's friends made profitable resort to intimations of acceptable distributions of patronage in the tense period when the outcome of the fight in the House hung in the balance.

The President was not adamantine, however, in his policy of guiding Congress. His position was that he should have the largest voice in all party councils. This did not preclude, of course, consultation with the other party leaders and concessions on his own part where differences arose. In most of his experiences with the Congress leaders the President has made his fight before the measure involved was brought out on the floors of Congress for a vote. Except in a very few instances, he has been guided by expediency in his dealings with the Congress leaders. He would try as best he could to get them to accept his views, but if he failed he did not resort to the executive veto.

Mr. Wilson has vetoed few important measures. His two vetoes of the Immigration Bill, which would apply an educational test to immigrants, scarcely count, for both incidents were more or less political claptrap. In each case Congress passed the measure in the expectation that the President would veto it. The members passed it because they wished to go on record as favoring the popular educational test, whereas the President, whose views on immigration had been cited against him in the 1912 campaign, was willing to take his chances politically with the veto.

A time came in the first year of the administration when many of the President's friends who held out for ideals as against political expediency prayed that he might exercise his power of veto. It was when the Congress embodied a provision in the Legislative, Executive and Judicial Appropriation Bill exempting labor unions from antitrust prosecutions under a special appropriation for the enforcement of the Sherman Law. The President failed to veto it. The explanation has been advanced by persons having a confidential relationship with the Administration that the President had given his word to certain House leaders to sign the measure at a time when he did not fully understand its significance, and that later he preferred to incur the possibility of criticism

than go back on his agreement. The explanation which has widest currency, however, and greatest plausibility also, is that the President was willing to make almost any sacrifice in order that no obstruction might be placed in the way of the tariff bill and the currency and anti-trust measures which it then seemed would constitute the body of the Administration's legislative achievements.

The broadening of the President's influence over Congress has had one inevitable result: the importance of the majority leadership of the House has been greatly diminished. The President's laying hold of much of the influence which the majority leader or the Speaker formerly wielded has been facilitated by the fact that Mr. Kitchin, the present majority leader, often found himself compelled by his convictions to oppose the administration. Mr. Kitchin, out of consideration for the party welfare, in practically every one of these instances, consented to vote merely as an individual and not to attempt to organize a fight against the President.

III.

It is as the leader of his party that the President has controlled Congress. His dealings with Congress have had no taint of that privacy which at times has impaired the public confidence in representative government. His councils with the Congress leaders have been partisan councils and no effort has been made to conceal their character. Except in times of crises when the full Committee on Foreign Relations of the Senate was invited to the White House, the men consulted by the President were the Democratic members of committees framing or handling legislation whom the President considered it proper for him to guide.

The President's power in his party increased as the months of his first administration rolled by. It was climaxed very naturally in his dominance of the Democratic National Convention at St. Louis. No other national convention was ever more completely mastered by a single man, for the simple reason that no such body could be more completely mastered. The President selected the temporary chairman and the chairman, and had them submit their speeches to him for review. He selected the men to write the platform and outlined some of the most important ideas to be embodied in it. He sent Secretary of War Baker and Secretary of the Navy Daniels to St. Louis to act as his personal representatives in the convention and upon the platform committee. All important developments at the convention were shaped by the President through his personal representatives. The most important plank of the platform, that on Americanism, was written by one of the President's advisers and telegraphed to St. Louis by the White House after the

convention had assembled. Strong objections were voiced to this plank by Democratic politicians, who did not think it would be wise for them to lay the lash upon the hyphenates. No one dared gainsay the President openly, however, for there were ominous reports from Washington that if the platform committee rejected his Americanism plank he would go to St. Louis and personally call upon the convention to sustain him. Also it was said that the President would repudiate his party platform if it did not accord with his convictions on Americanism. In one other matter the President inflicted his will upon the party organization for their mutual benefit. He decreed that neither the platform nor the speeches of the officers of the convention should make reference to the issue of involving the judiciary in politics, which was then being raised against Mr. Hughes. This overruled the views of important Democratic leaders, as did the President's stand for a suffrage plank.

High as he has placed the prerogative of party leader, the President has evinced a still greater regard for his place as spokesman of the nation in matters which concern the national welfare. This role he has assumed not only in times of international crisis, when the whole country was supposed to hold up the hands of the President, Mr. Roosevelt's admonitions to the contrary notwithstanding, but also in time of domestic crises, such as the recent controversy between the railroads and the operatives' brotherhoods when a calamitous national strike was imminent. A very impressive occasion of this sort came when the President applied himself upon the stump last spring to the task of convincing the nation that need existed for enlarging our instrumentalities of national defense. The President was intent then on getting a bigger army and bigger navy program through Congress. His own party was divided, so he set out to prevail upon the rank and file voters of the country of both parties to compel their representatives in Congress to support the bigger defense movement.

The President's successes in extending his powers as party leader and spokesman of the nation and his influence over Congress have a common explanation. They result, first, from his personal characteristics; the Presidency has ever been a powerful office for a Jefferson, a Jackson, or any other man of high spirit and imperious will. The other cause of his success has been the effective way in which he has mobilized the power of his office against those who stood in his way. Not only has he devised new means of doing this, such as his addresses to Congress and his practice of writing letters for publication; he has had frequent access to the opinion of the nation by a speech-making which amounted to an appeal over the heads of the members of Congress to the source of their representative power. Mr. Wilson's manner of doing this has

been effective in establishing bonds between him and the electorate. It is true, I think, that in many sections of the country the people themselves seem sensible of a more direct relationship with the Presidency than they had thought existed before. Mr. Wilson's practice has been to foster these ties. He has expressed his great interest in the thoughts of the common man as a source of guidance for him in time of crisis, and has sought to increase the number of citizens capable of sitting down and writing really valuable letters to the Chief Executive in time of stress. He has tried to develop an intimacy with "the silent men who watch public affairs without caring too much about the fortunes of parties."

There you have the source of the President's power. Mr. Wilson is a man of great affability and a great power of persuasion, and exerts a considerable influence by personal contact with Congressmen and Senators, although many of these have no real affection for him. Most of the would-be recalcitrants, however, follow his leadership because they fear his influence with their constituencies and they want to profit by this influence. There was a time, not long distant, when resentment against Mr. Wilson's attempted domination of Congress reached a high pitch on both sides of the Capitol. The evidence of this resentment had all vanished before election day, however. It may be that the feeling was smothered, or it may have died out. It is nearer the fact to say that the Congressmen gradually waked up to the fact that Mr. Wilson was stronger than his party, and that their most profitable role would be that of his warm supporters.

IV.

Mr. Wilson once wrote: "What we need is harmonious, consistent party government, instead of a wide dispersion of functions and responsibility; and we can get it only by connecting the President as closely as may be with his party in Congress. The natural connecting link is the Cabinet."

At another time he said: "It may be that the new leadership of the executive, inasmuch as it is likely to last (he was speaking of the prominence into which Mr. Cleveland had been brought by his direction of foreign affairs in his second term), will have a very far-reaching effect upon our whole method of government. It may give the heads of the Executive Departments new influence upon the action of Congress."

In accordance with these ideas Mr. Wilson as a student of our government subscribed to the view that cabinets should be made up largely of party leaders.

Mr. Wilson, in office, however, has chosen to establish direct contact with Congress rather than to utilize the possibilities of the Cabinet as

a "connecting link." He has been his own spokesman on practically every important political occasion. The conviction is clear in my mind that he subordinates partisan influence to administrative ability in his present conception of Cabinet efficiency. Shortly after his reëlection, Mr. Wilson made the significant statement that he was satisfied with his Cabinet, that he regarded it as a team that had been tested. Apparently he was not disheartened by any seeming dearth of meteoric players nor inclined to repeat an effort to utilize the services of a distinguished party leader like Mr. Bryan.

The President has not extended the power of his Cabinet beyond that vested in previous cabinets. He has not encouraged his official advisers to communicate important recommendations directly to Congress as Postmaster General Hitchcock did his recommendation for Government ownership of telephones during the Taft administration. Secretary of War Garrison sought, in 1914, to forge ahead of the Administration in the matter of army policy, but in doing so he opened the way for his withdrawal from the administration. No other Cabinet officer has emulated him on a very important matter of policy.

Cabinet officers have participated in practically all of the White House conferences at which legislative policies were formulated. For instance, Secretary of the Treasury McAdoo was consulted when the Tariff Law and the Currency Law were being framed, and dealt directly with the Committee on Banking and Currency, and Mr. McReynolds, the former Attorney-General, was called in when the antitrust laws were being prepared. These officers were present at the White House meeting, however, merely as advisers, and they exerted no influence in the conferences which they could not command by the intrinsic merit of their arguments.

The President's relations with many of his Cabinet officers have no high personal coloring, for he at times will go for weeks without seeing one or more of them. His attitude in this respect is indicated by the fact that in periods of crises, as well as at times of important developments in connection with the legislative program, the President has suspended Cabinet meetings for weeks at a time.

The President has kept in close touch with important administrative problems which the executive departments have been called upon to handle, and has not scrupled at an effort to influence the Government commissions in the evolution of their important policies. His paramount influence with the departments has been disclosed by his custom of reviewing the plans of the Attorney-General with respect to great antitrust cases. Two instances of the latter which have been widely discussed were the intimation to the Interstate Commerce Commission

of the President's views regarding the noted 5 per cent rate case, and his letter to Secretary of the Treasury McAdoo suggesting that the Federal Reserve Board authorize the establishment of joint agencies of the Federal Reserve Banks in South America. At least one member of the Interstate Commerce Commission is said to have been highly incensed at the President's attitude toward the Commission during the consideration of the 5 per cent rate case, and the Federal Reserve Board gave out a public statement announcing its decision not to carry out the President's recommendation. The President paid his respects to Government commissions in a speech at St. Louis in the spring of 1916, in which he said: "It is very interesting how important men feel after they get on a Federal board. They are thereafter hardly approachable. They are jealous of nothing so much as being spoken to too familiarly by the President, who seems to be regarded as some sort of suspicious political influence."

To those members of the Cabinet who have yielded the obedience which the President regards as necessary to team work, he has returned an almost paternal loyalty. More than a year ago, when the Secretary of Commerce, Mr. Redfield, was under fire, because of his conduct of the Government's investigation of the Eastland disaster at Chicago, the President stood firmly by him. At another time, when the agitation against the Secretary of the Navy, Mr. Daniels, was at its height, the President declared in a private conversation: "By God, he shall stay here as long as I do."

V.

Mr. Wilson's direction of our foreign policies during his administration was not an original exercise of the Presidential prerogatives. He has fully asserted his function in regard to foreign relations, but so did every other President whose tenure of the White House witnessed important international complications. His dominance of the State Department has been interesting, however, because of its singular completeness.

In the early stages of our difficulties with Germany, the saying had currency in Washington that Mr. Bryan's only contribution to the important notes he signed were his signature and the address, "Gerard, Berlin." It has been evident since Mr. Bryan's withdrawal and the appointment of Robert Lansing to the Premiership of the Cabinet that the President considered it more important that the State Department should furnish him with information as to actual developments in foreign affairs and as to precedents and proper diplomatic phraseology than that it should advise him upon fundamentals of policy. The say-

ing that Mr. Wilson has been his own Secretary of State has more than a grain of truth in it, although this statement would be unfair if it conveyed any reflection upon the ability or splendid purposes of Mr. Lansing.

The President has never consulted Congress on an important measure of foreign relations. He has addressed the Congress repeatedly on the Mexican situation and twice on our relations with Germany. But these addresses were largely statements of fact and reports as to what the President had done, or had decided to do. They were not bids for advice. Also he has called the Senate Committee on Foreign Relations and the leaders of the House Committee on Foreign Affairs to the White House, but for the same purpose. In nearly every case his mind already had been made up and the Senators listened to the President.

The guidance to which the President has submitted in directing our foreign relations has been that of public opinion. He does not hold with those European conservatives referred to by Mr. G. Lowes Dickinson, who consider diplomacy a finished science closed to the influences of democracy. On the other hand, he quite clearly has attempted to accord his policy toward Germany with the purposes of the body of the American people. Mr. Wilson has proclaimed his belief in the existence of the composite mind of the Nation. He has defined the obligation of public servants to grasp unexpressed thoughts and unuttered aspirations in the formulation of their policies. "The voice of America" is a phrase frequently upon his lips. And the same disposition to attune his foreign policy to the composite thought of his constituency is reflected in certain speeches in which he has asserted that it is the obligation of the new statesmanship to give a new warmth and human coloring to the hitherto cold and colorless relationships between one nation and another.

The influence I am trying to indicate is somewhat difficult to detect in all of Mr. Wilson's foreign policies. One might easily be content with the acceptance of the statement that he was guided throughout the Lusitania correspondence by the knowledge that the bulk of the American people desired to remain at peace. That disposition was fairly easy of ascertainment to a man with ordinary facilities for determining popular feeling. On the other hand, it is much more difficult to demonstrate that Mr. Wilson has had the public abreast of him at every stage of our relations with Mexico. With no desire to revive any of the partisan feeling of the recent campaign, I do feel justified in saying that there have been times when there seemed at least a close division among the American people as to whether it would not be better for the United States to send an army into Northern Mexico to insure settled conditions there in the future. The conclusion might be drawn from this that

in respect to Mexico Mr. Wilson had attached more importance to his own convictions than to public opinion. It might also be concluded that he was depending upon cloudy media for observations as to the state of public opinion. The better conclusion, however, and the one in which I have complete confidence, is that the President considers it equally his duty in respect of foreign affairs to be guided by the steady currents of national thought as he conceives it and to be impervious to unsteady popular clamor. Thus he was responsive to the demand for the preservation of peace with Germany, while he could not be influenced by the widespread desire to have our army inflict peace on Mexico.

VI.

From the foregoing resumé of what Mr. Wilson has done, we may proceed with justifiable confidence to an appraisal of his contribution to the science of government. He has expedited the evolution of the Presidency as a party leadership demanding statesmanlike qualities. That is his outstanding contribution. He has made of the Presidency the unifying and harmonizing factor in a not too well organized government. That is the thing he has done which makes the Presidency a somewhat different kind of office for his successors from what it was to those who preceded him. He has gathered into the hands of the Chief Executive more of the actual prerogatives of party leadership than formerly were conceded to him. His administration has had nothing of that "separateness" from Congress for which he criticised the first Cleveland administration, and which would have characterized Mr. Hughes's administration if we are to accept at face value his statement that "The President is primarily an executive; it is his supreme duty to attend to the business of the Nation, to safeguard its interest, to anticipate its needs, to enforce its laws." "My conception of the Presidency," said Mr. Hughes, "differs absolutely from Mr. Wilson's. I look upon the President as the administrative head of the Government. He looks upon the President as primarily the political leader and the lawmaker of the Nation." The President has been and will be held responsible for every large matter in Washington. The country will look to his office more and more to accept this responsibility. Mr. Wilson has seen to it that the office should possess the power which goes with the responsibility.

In thus shaping the Presidency, Mr. Wilson has followed up the line of development discernible in our political history. Changes have been made in our government, some by constitutional amendments, and others, such as that in the method of electing the President, without altering the Constitution. Further changes are predictable from the

character of what already has been done. Mr. Wilson has said that the President "must be Prime Minister, as much concerned with the guidance of legislation as with the just and orderly execution of law," and "the spokesman of the Nation in everything, even the momentous and most delicate dealings of the Government with foreign nations." Sooner or later he believes it inevitable that the President will "be made answerable to opinion in a somewhat more informal and intimate fashion." It is clearly evident that this change will be worked out in true American fashion and recognized in the Constitution only when the popular conception of the Presidency has advanced further along the lines laid down by Mr. Wilson. The powers of the party leadership will be still further enlarged so that the Presidency will be more than ever the integrating factor in what Mr. Wilson earlier referred to as the "disintegrated structure" of our Government. Thus the Nation will avoid "the pinch of disadvantage" which, according to Mr. Wilson, "must sooner or later result from the singular division of our Government into groups of public servants looking askance at one another." Thus it will, to quote Mr. Wilson again, "substitute statesmanship for government by mass-meeting."

The logic of our conclusion as to this phase of Mr. Wilson's work, it seems to me, has no relation to our estimate of the foreign and domestic policies for which he has been praised and criticised. Divergencies of view as to the practicability and honorable character of his foreign and domestic policies should not deter us, as they will not the historian, from an appreciation of the wholesome development he has accelerated in our governmental system. Progress in the direction in which his administration has pointed the Government will bring democracy at last into the very sight of its hope: efficient representation.

A New Epoch

BY WILLIAM THOMAS LAPRADE.

It is not given to many generations to witness the passing of an epoch. But every well-informed adult now alive knows that the past several years have brought transformations almost too vast to be comprehended. This year seems scarcely akin to 1913, and the next few years seem to offer insuperable difficulties to any attempt to fathom them. If you wish to get an impression of the changes now in process try to recall your point of view three years ago. Better still, examine the files of the daily and weekly press of that time. You will find yourself in another world with strange questions, a vast ignorance, and petty quarrels. You will find it hard to convince yourself that the same persons who are living in these heroic years expressed themselves in that paltry language.

I know of only one other time in modern history that, in this respect, can be compared with our own, namely, the early years of the French Revolution. The newspapers, the contemporary memoirs, the pamphlets, and the private letters of that time bear testimony that those who produced them were conscious that their day, like our own, marked the end of one epoch and the beginning of another. They were not clear as to the character of the past or as to what the future was likely to bring forth, but they were convinced that at any rate the future would be different.

Since this is a time of transition and heart-searching it would seem to be appropriate to recall some of the characteristics of the epoch introduced by the French Revolution which now seems to be passing, and to see whether it is possible to look with any degree of plausibility into the future.

We shall probably agree that the nineteenth century as an epoch in history got fairly under way in 1814 on the fall of Napoleon, and culminated in the outbreak of the present war. If there were time to delve further into the past we might observe that by a curious coincidence there were also precisely an hundred years between the Congresses of Utrecht and Vienna. But we shall only note briefly the chief characteristics of the century introduced by the latter congress.

The first characteristic which attracts our attention is connoted by a word now never long absent from the lips of a student of history. The nineteenth century was preëminently the time of the growth of nations with a unity of feeling and institutions. There is no need to call the roll of the countries that passed through that experience. It would be

easier to name those that did not. But if the nineteenth century was a time when the nations grew up from dynastic infancy to self-conscious political life, it was also a time when the doctrine of individual liberty as a political ideal received widespread acceptance. In some of the countries the struggle for liberty and for national unity went hand in hand. Cavour, for example, cherished a desire to introduce into his own beloved land both of these ideals, which had been inspired in him while he resided in the country that was the mother of nations and the fountain of liberty. And if liberty was finally defeated in the development of the German nation it was not because it lacked champions, as witness the migration of German liberals to this country after their defeat at home.

Trained in the old school, as most of us are, we have no difficulty in reconciling these two ideals with all that seems desirable in social life. It is when we meet the third characteristic in the development of the nineteenth century that our troubles begin. Excuse it as we may, the fact is that this century of exuberant national life and zealous pursuit of liberty was likewise the century in which the strong men of the nations were most successful in exploiting the weak and in accumulating and managing in their own interest the fruits of the labor of the less fortunate. This fact is no less evident if we admit that under the régime of these strong men has occurred more rapid advancement toward that vague goal we call civilization than in any other interval of comparable length in human history. At any rate, in no other century were the strong men able to work so effectively or to accomplish so much. Moreover, in no other century were the weak, despite their individual liberty, made more utterly dependent on the strong.

Very little reflection will serve to make it clear that a community which is striving toward individual liberty as an ideal is laboring to make it easier for the strong to exploit the weaker. It was the mistress of the seas, a nation already head and shoulders above her rivals in industry and commerce, that threw down the gauntlet in the nineteenth century and challenged the world to adopt a policy of liberty in trade. And the battle for individual liberty in the past several centuries was largely fought at the instigation of the strong men of the growing nations, who were anxious to throw off the fetters imposed on their activities by the outworn forms and petty tyrannies of a past age.

The nation itself was largely a by-product of this struggle of the strong men for an opportunity to exert their strength. In one sense England got rid of the Stuarts and France the Bourbons in order to give the strong men control. In Germany the ruling house profited by the example of other families that had lost power or office, or both,

formed a partnership with the strong men of the nation, and coöperated with them in the task of exploiting the weak. Thus that which the strong men of the liberty-loving nations did as a right those of Germany did as a privilege. The result was similar in many respects, the chief difference being that Germany never became a home of liberty.

A little study of the nation makes it clear that, with the average level of education and general intelligence what it was in the nineteenth century, it would have been difficult to invent a contrivance better adapted to serve the purposes of the strong men. The inhabitants were merged into a fictitious personality, were provided with proper shibboleths, and were taught to recognize a code of national honor similar in many respects to the code prevalent among gentlemen when dueling was in fashion. Their former loyalty to their clan or to their leader was transformed into an enthusiasm for this complex unity of which they somehow felt themselves constituent parts, but which tended to blind them to merits of the question. If they reached a point where it seemed to be theirs to reason why they but repeated parrot-like arguments made ready for the occasion by the strong men or the employees of the strong men who constituted the brains of the fictitious person. If they did now and then decide questions by their votes they were questions made ready by some group of these same strong men who also supplied the reasons for voting one way or another. By this arrangement a member of the multitude came to feel it a greater obligation than before to spend himself in support of the honor of this nation of which he felt that he was a member. It is not remarkable, therefore, that Napoleon, with a nation at his call, could accomplish greater things than Louis XIV., who after all was but a dynastic monarch. Nor is it remarkable that the nations now at war are striving in a combat which beggars description and which makes all former wars insignificant by contrast.

My chief reason for making these observations is because they seem to me to betoken something of the future. If I have read history aright, the ideal of liberty and the conception of a nation which gradually emerged in the seventeenth and eighteenth centuries, and which, in the nineteenth, gave the strong men an opportunity never before afforded to them, is now in a process of transition to another stage in the evolution of human society. As the nineteenth century may be regarded as the century of nationalism and liberty, so, it now seems likely, the twentieth may come to be known as the epoch of democracy and justice. If this be the true view, the comparatively small groups of strong men who, under a régime of liberty, were able to build nations and to shape national policies to their own advantage will yield to a social system dominated by the mass of the people largely in their own interest.

It is tolerably clear that such a change would tend to curtail the liberty of individuals. Nothing is more familiar to thoughtful persons than the practical antithesis between democracy and liberty. But the terms have been so frequently married in the loose phraseology of our public discussions that the less careful think of them as almost complementary, and a word of emphasis on the distinction is not out of place. The point is that the more completely the mass of the people come into a realization of their real potency in producing the wealth and fighting the battles of the world the less inclined they are to abide by the old doctrine of *laissez faire*. Of course, even those eighteenth and nineteenth century enthusiasts who thought the least governed people to be the best governed were far from believing in absolute liberty, but they were convinced that it would be for the advantage of society to give a wide latitude to individual activity. The democrats, on the other hand, know that if liberty is in vogue to this extent, particularly in the economic world, the strong men will increase their strength, too frequently at the expense of the weak. And so it is a natural tendency of the more numerous weak, when they awake to the situation, to organize themselves for the purpose of bidding defiance to the strong, even though it is necessary to give up somewhat of their liberty in so doing.

This clash of democracy and liberty is apparent in the opposition to child-labor legislation, compulsory school laws, factory legislation, and the like. Whether one agrees with the supporters of these measures or not, they are manifestly, at bottom, attempts of the mass of the people, the democracy, to place restrictions on the liberty of strong men to profit at the expense of the weak.

The ideal which the democracy must necessarily offer as a standard by which to measure proposals of this sort is justice. Not perhaps the justice of the schools of law with its element of precedent and preconceived notions based on former practices, but a justice which aims to comply with the demands of a humanitarian generation that everybody be given a square deal. And when this demand for a greater opportunity to enjoy the products of their labor shall come from the mass of the people, conscious of their power, whether the demand be for higher wages, shorter hours, or other better standards of living, the demand will ultimately prevail as far as it is practically possible. In consequence, the dominancy of the strong men which we have witnessed under the régime of liberty will tend to give way to a democratic rule, in which the first great task will be to curb the strong and make them helpers in the task of raising the general standards of living. It is not necessary to be blind to the difficulties of this undertaking or even to believe that

it will ultimately succeed to see that in the nature of things it must be attempted.

Admitting these premises, however, is it probable that the present war will introduce an era of democracy? Surely a time when national feeling has reached the height of its fervor, when vaster multitudes than ever before are making supreme sacrifices in the service of their nations for the sake of causes formulated by strong men, in many cases in the interest of strong men, is scarcely a feasible time to muzzle leaders who have given such amazing evidences of their power. Perhaps not, and yet when a political pendulum has swung far in one direction there is the greater reason to expect a swing backward.

But there are other more tangible reasons for concluding that this war may operate to place limitations on the liberty of both individuals and nations, and likewise that it may hasten the coming of the time when democracy and justice will be more prevalent. There were three potent factors which, among others, in the past tended to preserve the existing order without radical change. In the first place, there was the innate conservatism of the mass of the people. The two classes of people most difficult to convince that change is necessary are those who dominate the existing order and profit by it, and those with untrained minds, who go to make up the mass of those who are thus dominated. From the point of view of this latter class, the existing system, providing for a large measure of liberty in amassing and controlling wealth, worked; they could not be sure that another would, and naturally those who were profiting by the existing order did not try to convince them. Accordingly, they learned to endure hardships, preferring to bear the ills they had rather than experiment with others of which they had no certain knowledge.

Again, in spite of many hardships suffered by a considerable portion of the population under the régime of liberty, for a majority of people life has been tolerable. Laborers have received a sufficient share of the products of their toil to enable them to exist in some comfort. Consequently they have not had an irresistible impulse, born of necessitous conditions, to induce them to seek a change. There have been, it is true, signs of what is coming, but with no more pinch than past conditions caused we might very well have gone on for a considerable time using that useful device of the régime of liberty, collective bargaining.

Finally, as a result of their traditional habit of submitting to the guidance of stronger men and their lack of inclination for strife or change, the mass of the people have not been made fully aware of their power when acting collectively. When they have made intermittent at-

tempts to remedy one condition or another they have been outmanœuvered by the stronger men and again brought into subjection, with the result that they came to distrust the existence of their strength itself.

Now, the remarkable thing is that this war, which exemplifies as no other has the docility of the mass of the people in the service of strong leaders, is tending rapidly to eradicate the very causes which in the past prevented the democracy from coming into power and shaping public policies in its own interest. Think, for example, of the blows struck with bewildering rapidity and astonishing success at our time-honored notions of individual rights in private property. We were wont formerly to tell the advocates of community control of the instruments of production and distribution that these things could be more efficiently managed under a system of private ownership. In fact, our traditional feeling was that the strong men who had somehow amassed wealth of this sort had an inherent right to manage it pretty much as they pleased. Just recently, one of our reviews, discussing the demands of certain laborers for a greater share of the incomes of our most important instruments of distribution, referred to "the downtrodden investors in railroad securities." But it is doubtful whether the mass of the people in the warring countries will give much weight to these arguments when they return to their homes and undertake to rebuild that which they are now seeking to destroy. Who will have the assurance to tell them that private ownership and management of great industries is more efficient, and that it is dangerous to meddle with private property in these forms of wealth in the face of the short shift given by the governments to the owners of these properties in the time of the nation's need? There can never again exist, in England for example, the same timidity and fear of government interference in business that existed before the war. The captains of industry, if they hold their positions, must find arguments different from those which they formerly used.

Not only will this traditional conservatism be shattered by the evidence of inescapable facts, the men who are now in the trenches, in munition factories, in mines, and in other forms of vital industrial employment, will also come out of the war with the knowledge that they were the dependence of their governments in the time of need, and that they were repeatedly able to compel the strong men in charge of the affairs of the nation to stand and deliver when they demanded higher wages, pensions for their families, and the like. Will men thus made aware of their power return home when the struggle is over and supinely take up where they left off the task of piling up wealth for the nation,

for the strong men to manage, content if they are given a sufficient share to provide sustenance for themselves and their families?

A third factor makes it unlikely that the transition from war to peace can be accomplished in this easy fashion by a settlement that has any of the elements of permanence. The vast increase in the expenditures and additions to the indebtedness of the nations at war and of other nations affected by the war have operated to raise the level of prices of almost all commodities. When peace is made there will of course be a lessening of the demand for some materials used in warfare, but the task of reconstructing that which is now undergoing destruction and of replenishing the storehouses now being emptied as well as of bearing the burdens of taxation necessary to meet the interest on obligations now being incurred and then necessary, will tend almost inevitably to make money still cheaper and to raise the general level of prices even higher. In consequence, laborers will be able to purchase less for their wages and will demand an increase. It is improbable that the employers of labor, even though they are obliged by the governments to keep peace by raising wages while the war is in progress, will submit to further demands at its end without a struggle. In this way an occasion may arise giving the democracy a chance for exerting its strength while it is keenly conscious of possessing it. Moreover, this occasion would arise before the radical methods of the governments in using private property for public purposes had been forgotten. It is from a struggle of this kind, which it seems difficult finally to avoid, that the twentieth century will probably take its tone. That being so, there is every reason to assume that the final compromise reached will be much more concerned with the welfare of men and women in general than with the liberty of the strong to get and retain.

The same reasoning makes it apparent that the nation will be a less influential factor in the history of the twentieth century than it has been in the nineteenth. It is not necessary to look far beneath the surface to see that the interests and ideals which are clashing in the titanic struggle now going on are largely the interests and ideals of the groups of strong men who have builded and dominated the nations. These strong men have taught the members of the democracy how to be loyal to a nation without forgetting their obligations to the family or the local community. It is only a step from national feeling to consciousness of a common interest with all humankind. It is true that the war came in spite of the dream of social democrats of an international democratic alliance which should force European governments to keep the peace. The national feeling so long instilled in the people of the European nations was strong enough to overshadow the untried theories of

enthusiasts, and on the outbreak of the war the democrats went willingly to fill up the ranks of the national armies, giving the nation a new lease of life.

But after all, from the point of view of the candid moralist, there is no good reason why men should support the nation of which they are inhabitants unless that nation is seeking to do justice and to accomplish the right. And it is doubtful whether German agricultural and industrial laborers, if left to themselves, would have many serious grievances against the French and British laborers whom they are now seeking to slay in such large numbers. It is indeed questionable whether the soldiers in the ranks of the armies of any of the warring nations, if uninfluenced by the current doctrines of the ruling classes in their several countries, would be interested in fighting to crush one nation or to increase the influence and prestige of another.

Of course, however, they are influenced by the doctrines of the strong men, who have, perhaps unwittingly, brought on this war. And it is not unlikely that these doctrines will play a part in the determination of the terms of peace. It would be surprising if they did not. But that probability is not an argument against the interpretation of the future here set forth. You will recall that the stupid statesmen at Vienna a century ago in a like manner ignored the nation and sought to compass the destruction of liberalism in their vain attempt to create a stable régime and make a permanent peace.

The Sovereign State of North Carolina, 1787-1789

BY W. W. PIERSON, JR.

The people of the United States have never been very much interested in systematic political theory, except in an academic sort of way, and it has been seriously questioned if there is an American political theory.[1] This fact is really remarkable to the student who realizes that every important period of American history has been dominated by political theory. This is not a paradox, for, while the Americans have not developed philosophical systems of politics, the theories have generally taken form in association with political problems on which the people were divided between approval and condemnation. The outstanding examples of this truth may be found in the party struggles over independence, slavery, secession, and imperialism. Contempt has often been expressed of mere theory, yet of the multiplicity of causes which eventually culminated in the War of Secession, the most insistently obvious one was the profound difference in the political philosophy developed and endorsed by the sections. In that crisis of 1861 the supreme question was: Is the American State a sovereign state? If one reflects upon the momentous results in history and upon the great changes in political thought and life effected by the so-called Civil War, the conclusion is practically inescapable that the question just mentioned has been the most important one in American history. On July 4, 1861, Mr. Lincoln, in one of his most important state papers—his first message to Congress—undertook to answer it. After defining a sovereignty as being a "political community without a political superior," he said:

> Tested by this [definition] no one of our States except Texas ever was a sovereignty. And even Texas gave up the character on coming into the Union . . . The States have their *status* in the Union, and they have no other legal *status*. . . . The Union is older than any of the States, and, in fact, it created them as States. Originally some dependent colonies made the Union, and in turn the Union threw off their old dependence for them, and made them States, such as they are. Not one of them ever had a State constitution independent of the Union.[2]

These opinions are quoted with no purpose of making the effort to prove a great man wrong. It is possible, indeed, that he may have been right, for there were those at the Federal Convention of 1787, which framed the Constitution, who expressed practically the same ideas. The statement has been sharply criticized, however, for historical inaccuracy,

[1] Merriam, *American Political Theories*, vii.
[2] McPherson, *History of the Rebellion*, I, 127.

and possibly the opinion would have been pronounced erroneous by the people had it been submitted to a vote in 1861.[3] It has been thought that not 10 per cent would have concurred in it. The short work required by Mr. Lincoln to dispose of the theory of State sovereignty, which had very obvious possibilities of serious embarrassment for him, really is, in my opinion, to be associated with him as a politician who faced a crisis with consistent ideas and theories, rather than a historian who oftentimes gives a meticulous regard to nice distinctions, "pernicious abstractions," and to the merits of causes which sometimes fail of their purpose.

Has there ever been a sovereign State in the American Union? The title of this paper indicates that the writer of it would answer the question affirmatively. The thesis is based on the following facts: The States of North Carolina and Rhode Island in effect rejected the Constitution which was submitted to them for ratification by the Federal Convention. They remained out of the new Union, which was established through the ratifying acts of eleven States, and thus they resumed, or, if you will, assumed, an independent *legal* and *political* status. The purpose of this paper—the first of a series which will deal with North Carolina and Rhode Island—therefore, is to consider in an introductory way certain aspects of the history of North Carolina in 1787-1789 and of the relations of North Carolina and the United States which are pertinent to this thesis.

North Carolina of the Revolution and of the Confederation has been called the most democratic and the most American State of the Union. Despite restrictions of the ballot to the taxpayers and property qualifications for the important offices, the claim, in my opinion, seems well justified.[4] The most striking characteristic of the North Carolina of that period, however, was, if I am not in error, the particularism of its people. This took at least two forms. There was a joy in being a North Carolinian, possibly in part due to the citizen's happy escape from being of South Carolina on the one hand and of Virginia on the other. This intense love of the State was accompanied, secondly, by distrust and jealousy of any effort to restrict the State's complete independence. So careful were the patriots that the rights of the State might not be injuriously affected that the Articles of Confederation were not at first ratified, because certain articles were regarded as "containing matters highly important and interesting to the future of this State, and involving what may very materially effect the internal interests and sovereign

[3]Dunning, Essays, 12.

[4]Beard, *Economic Interpretation of the Constitution*, 64-72, 239-252; McKinley, *Suffrage in the Thirteen English Colonies in America;* Connor, R. D. W., *Governor Samuel Johnston of North Carolina* in *North Carolina Booklet*, April, 1912, 262. Consult also *Ibid., Cornelius Harnett;* see also speech of President Butler at the inauguration of President Edwin A. Alderman, Extra Number of the *University Record*, 1897, 17-21.

independence thereof, and . . . ought not to be ratified until there shall be full time and leisure for deliberately considering the same."[5] Another very interesting demonstration of the independent spirit of North Carolina occurred when Congress in 1779 censured Dr. Thomas Burke for having refused to attend a session when his presence was necessary for the formation of a quorum. He defied Congress and held himself responsible only to the State of North Carolina, saying that "until the laws of the State I represent shall expressly declare the contrary, I shall hold myself accountable to that State and to no other power on earth."[6] And the State legislature upheld him! Such was the controlling sentiment of the North Carolina which was a member of the Confederation, and such was the controlling sentiment—at least of one party—when the State was called upon to consider ratification of the Constitution. Despite this attitude toward politics, National and State, there was a conservative party, inclined strongly toward the Union and to the establishment of an energetic and powerful central government, and disposed to look upon democracy with disfavor. This party was formed of lawyers and of the highly educated and refined people of the State, and regarded the radicals as the rabble led by demagogues or as extremists misled by abstractions. The leader of the one was the able Samuel Johnston, and that of the radical democracy was Willie Jones.[7] The State was divided; the leaders of greatest ability were on the side of the conservatives, while the majority of the people were democratic and radical.

Any investigation or inquiry into the subject of State sovereignty in 1787 would lead us to the Federal Convention and the work of the framers of the Constitution to ascertain what was then thought about sovereignty and what was then done that affected it. It is with this purpose that we are now immediately concerned.

The selection of the delegates to the Federal Convention which was to frame the Constitution occurred at a time when there was a decided reaction from the democratic radicalism of the days when the Declaration of Independence was written. The men at Philadelphia were the most conservative of the conservatives, who felt that the ills suffered during the "critical period" to be due in part to an "excess of democracy." Decentralized government, paper money, popular movements like the Shay's Rebellion, they regarded with a disfavor so extreme at times as to amount to a passion. The absence of such men as Jefferson, Samuel Adams, Patrick Henry, and Willie Jones allowed the debates

[5]State Records, XII, v.
[6]State Records, XIII, 87-89.
[7]For Johnston, see Connor, R. D. W., *Governor Samuel Johnston of North Carolina;* for Jones, see Long, *Willie Jones, a brief sketch of his life,* the *University Magazine* (N. C.), New Series, 1908-09, 22-37. Nash, *The North Carolina Constitution of 1776 and its Makers, James Sprunt Historical Publications,* Vol. 11, 9-23.

there to assume a particularly undemocratic tone. From what is known of the men who were elected or appointed members of the Federal Convention and from the records of that convention, it seems safe to conclude that their purposes were to evolve a constitution which would provide for a strong government, which would give ample protection to property, which would establish public credit, which would curb popular tendencies and enable men of respectability, refinement, education, and wealth to rule, and yet a constitution which would secure liberty. In these purposes the delegates of North Carolina joined the majority.

Respecting the nature of the new union that was to be established, it has been generally thought that the convention was divided into the large State men and the small State men, the one favoring the plan proposed by the Governor of Virginia, Edmund Randolph, providing for a strong central government and a congress chosen on a basis of population or land values, the latter favoring the plan proposed by the Attorney-General of New Jersey, Patterson, providing for a central government which would have the power to lay taxes and enforce obedience, and for a national judiciary, but demanding a congress in which the States should have equal representation. Such a classification, however, does not reveal accurately the real diversity of views on this matter of the relationship of the States to the proposed union and general government. During the debates on this subject at least five positions were assumed by various groups. In the first place there were those who would destroy the States altogether and establish a *"consolidation."* Such views were expressed at one time or another by Read of Delaware, Butler of South Carolina, Wilson of Pennsylvania, G. Morris of Pennsylvania, Hamilton of New York, King of Massachusetts, Madison of Virginia, and Randoph of Virginia. The last two are placed in this group because the operation of the Virginia plan would have had immediately or ultimately a destructive effect upon the States. In the second place, there were those who would allow the States to continue to exist because of the advantages they offered in local government, but would deprive them of most of their powers. Probably most of the members of the convention favored this policy, and many of the advocates of the first idea later came to endorse it, such as Wilson. They later called themselves Federalists; but, certainly, the name "Federalist" in political science does not denominate their theories, for they were not advocates, but opponents, of equality among the States and of the establishment of a federal system of government. Many of this group may be considered as forming another party: those who denied any present or past sovereignty to the States, but who occupied exactly the position of Mr. Lincoln. His position, as before affirmed, has often been called unhis-

torical, but, whether he knew it or not—and apparently he did not know it—there was ample foundation for his opinion if one takes the recorded expressions of certain members of the convention as authoritative precedent. Rufus King, during this important debate, said that the terms "States," "sovereignty," "federal," and "national" had often been used inaccurately.

> The States were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defense or offense, for they could not of themselves raise troops, or equip vessels, for war. On the other side, if the Union of the States comprises the idea of a confederation, it comprises that also of consolidation. A Union of the States is a union of the men composing them, from whence a national character results to the whole.[8]

What comfort would this not have given to Daniel Webster in his great debate with Calhoun in 1833! The three parties heretofore mentioned seemed so deeply convinced that the Confederation was irremediably inefficient, and that the United States under the Articles were drifting surely toward anarchy and ruin, that their ideas went naturally perhaps to the opposite view of the necessity for a consolidation. And the members of these groups dominated the convention and wrote the Constitution with those few but important modifications which the State rights and small State men forced upon them, which modifications of their program they accepted with bad grace. The advocate of State sovereignty will find little comfort in reading the records and journals of this body. These advocates were present, but their ideas were not the prevalent ones, and their statement of them oftentimes timorous and apologetic. Of these there were two groups: first, those who would maintain the States with all the powers possessed under the Confederation and who denied that the convention had the authority to change their status; and, secondly, those who desired to maintain the equality of the States, but who at the same time saw a need of a stronger central government and were ready to sacrifice many of the powers hitherto exercised by them. Among these were Paterson, Lansing, Yates, Martin, Mason, Sherman, Johnson, and Dickinson—names little known to subsequent history. In case, however, one feels any loyalty to the Federal system of government, that one should at the same time feel deeply grateful to those men who struggled so consistently for the continuance of the States. It is not too much to say that the present system of gov-

[8]Farrand, *The Records of the Federal Convention*, Vol. I, 123; Gouverneur Morris said, "This country must be united. If persuasion does not unite it, the sword will." *Ibid.*, I, 530.

ernment is due to their persistent efforts; more so, in my opinion, than to the alleged father of the Constitution, James Madison.[9] It is of considerable significance, I think, that of the names mentioned only two, Mason and Luther Martin, were from the South. It would not be amiss for the South to take stock of the political theories of its representatives at the convention in order to take cognizance of this distinctly nationalistic tone. And what is to be said of the political foresight of those Southern statesmen who would have established a consolidated government? Federalist South Carolina of 1787 and State sovereignty South Carolina of 1833 and 1861! Within less than a generation the South was seeking with all the skill available to find the sovereignty which certain of her statesmen, Madison included, would voluntarily have surrendered. And Madison knew full well the nature of the political differences of the times—the growing rivalry and separation of interests of North and South. Whatever may be said of the abilities of these men, it is apparently true that their political prescience was astonishingly deficient in this crisis.

In the Federal Convention the North Carolina delegates acted with the conservative groups. Davie, Spaight, Williamson, and the others, except Martin, belonged in North Carolina politics to the conservative party of lawyers and professional men, who had come to regard the democratic pretensions of the turbulent days of the Revolution as abstractions. They were willing to evolve checks and safeguards against democracy. On the great compromises North Carolina at first joined the large States and aided in forcing the acceptance of the plan for proportional representation in the lower house of Congress; but they cast the deciding vote in the great contest for State equality in the representation to the Senate.[10] Respecting the second compromise—that granting representation for three-fifths of the slaves in exchange for congressional control of commerce—the delegates acted possibly their most prominent part. The proposition relative to slave representation was first made by Dr. Williamson, and General Davie, in his most important speech before the convention, delivered the ultimatum that in case the compromise were not adopted the business of making a consti-

[9] *Madison on the States;* Farrand, I, 471, (as quoted by Yates): "Some contend that the States are sovereign, when they are only political societies. There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The States never possessed the essential rights of sovereignty. These were always vested in Congress. The State of Maryland voted by counties; did this make the counties sovereign? The States, at present, are only great corporation, having he power of making by-laws, and these are effectual only if they are not contradictory to the general confederation." Madison quotes himself as saying that he "thought too much stress was laid on the States as political societies. There was a gradation, he observed from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty. He pointed out the limitations on the sovereignty of the States, as now confederated; (their laws in relation to the paramount laws of the Confederacy were analogous to that of by-laws to the supreme law, within a State.)" Farrand, I, 464. A bitter controversy developed over these two quotations and their respective meanings, between Madison on the one hand and Citizen Genet on the other, for which see Farrand, III, Appendix A, cccx, cccxci, and ccclxxxviii.

[10] Connor, H. G., *The Convention of 1788,* in *North Carolina Booklet,* Vol. IV.

tution "was at an end" so far as North Carolina was concerned.[11] The tradition is that this announcement created a profound sensation. The compromise was adopted, and doubtless the constitution was thus assured. Davie later explained his motives as follows: "It became our duty, on the other hand, to acquire as much weight as possible in the legislation of the Union; and as the Northern States were more populous in whites, this could only be done by insisting that a certain proportion of our slaves should make a part of the computed population."[12]

With the Constitution framed, the next step was to secure its ratification. With the details of the campaign for this purpose in any of the States, including North Carolina, this paper cannot deal. Briefly stated, parties were formed in North Carolina, as in other States, for and against ratification, and taking the usual names, Federalist and Anti-Federalist. The leaders for ratification were Iredell, Johnston, Davie, Spaight, and Maclaine; and in opposition to it, Willie Jones, Caldwell, Spencer, Bloodworth, and Person.

In the pre-convention compaign in North Carolina the Anti-Federalists announced as their reasons for opposing the Constitution the absence of a bill of rights, the indubitable tendencies toward consolidation which appeared in it, and the grant of extraordinary powers to the proposed Federal judiciary.[13] Other contributory and perhaps more powerful motives were the suspicion of the government framed by the conservatives, the fear of a strong, independent, and energetic central government, and the instinctive reluctance to surrender State powers which was due to the inherent particularism of North Carolina people. The motives, either singly or collectively, caused the selection of an overwhelming majority in opposition to ratification. But the election of a majority in other States which was opposed to ratification had not always resulted in the defeat of the Constitution, and it is interesting to observe whether or not the North Carolina delegates will have the courage of their convictions.[14]

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[11]Farrand, *Records*, I, 593.

[12]*Ibid.*, III, 342. Under the Confederation, twelve States, in Congress had agreed to slave representation.

[13]Raper. *Why North Carolina at first refused to ratify the Federal Constitution*, Reports, 1905, American Historical Association, 99-107.

In connection with the absence of the bill of rights from the Constitution, it is well to remember that the Federalists said in explanation that the powers of the general government were delegated and enumerated powers, thus making a bill of rights unnecessary. Johnston and Iredell in North Carolina and James Wilson of Pennsylvania agreed in this idea. It is interesting to reflect upon the absence from their minds apparently of any thought or expectation that a Congress and a court might come later to construe the Constitution loosely, to stretch the "general welfare" clause and the "necessary and proper" clause to unforeseen extremities, and to adopt such laws as the alien and sedition acts. Mr. Jefferson was certainly on surer ground when he wrote Madison in this connection, that "To say, as Mr. Wilson does, that a bill of rights was not necessary, because all is reserved in the case of the general government which is not given, while in the particular ones, all is given which is not reserved, might do for the audience to which it was addressed; but it is surely a *gratis dictum*, the reverse of which might just as well be said; and it is opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present Confederation, which had made the reservation in express terms." Washington, editor, Jefferson's *Works*, Vol. 2, 329.

[14]New York and probably Virginia and Massachusetts.

The convention met at Hillsboro on the 21st of July, 1788, and selected the conservative Samuel Johnston as presiding officer. This paper cannot deal with the details of the procedure, but only with the outcome and certain of the reasons for that result. The parties in the convention were led by two remarkable men—James Iredell, the ablest lawyer and statesman, and Willie Jones, the ablest and most influential politician in the State. From the standpoint of this paper, Mr. Jones is easily the most interesting figure present.[15] This remarkable man was so like Jefferson, his ideal, that he seems to have been as much of a prototype as was possible. A poor speaker, a free thinker for that time, a genius in politics who relied upon letters and private conferences to effect ends—these are qualities which fit either man, though it must be said that Willie Jones left little permanent evidence of his political influence and methods in the form of letters and papers. Mr. Jones has been judged, and must be judged largely, on the basis of tradition and on the testimony of others—and others who were frequently opposed to him. But Davie also was not a writer. The only great difference between him and Jefferson seems to have been in the scope and sweep of ambition, Jones having no ambition for office, particularly outside of North Carolina.

In the debate on the various sections of the Constitution, there occurred at the very outset a discussion which bears directly upon the subject of this paper and which has never been appreciated for what, in my opinion, seems its proper significance. Dr. David Caldwell opened the debate for the opposition by demanding what right the Federal Convention had to use the term "We the people," with which the preamble of the Constitution begins. He said:

> Mr. Chairman, if they mean *We the people*, the people at large, I conceive the expression is improper. Were not they who framed this Constitution, the representatives of the Legislatures of the different States? In my opinion they had no power from the people at large, to use their name, or to act for them.[16]

Mr. Joseph Taylor expressed the thought that the Convention aimed at a consolidation, and that the expression was designed to refer to the people *en masse* irrespective of State lines. Just why Davie and Spaight remained silent as to the true reason for the use of this expression is to me incomprehensible. Iredell and Maclaine stated that the expression was intended to refer to the future—that is, to the time after ratification when the Constitution would be the act of the people. There was no real answer to Caldwell's question, except in defending the delegates in the convention from the charge that they had assumed unwarranted

[15]For his position, see McRee, *Life and Correspondence of James Iredell*, II, 232.
[16]Elliott Debates, III, 29-37; 139-140; 145.

powers, and the question was left for the bitter days of the Hayne-Webster debate, and finally to settlement on the battle-field. The great potential importance of the expression was then unappreciated, though it is quite possible that the conservatives had ideas not very different from Webster's, and that they did not venture a more thoroughgoing defense.

The next subject on which the debate touched, which related to the status of the States, was in discussing the power granted to Congress to control the time and place of holding congressional elections. The opposition vehemently asserted that this power denoted a trend toward a consolidation, and that it was a reason why North Carolina should beware.[17] Davie, Iredell, and Maclaine defended and explained with all possible eloquence and force, but time has shown that Congress has used this grant to accomplish many of the results feared by the opponents of ratification.

When the objections to the Constitution had all been heard and answered by the defenders, Willie Jones moved the previous question, shutting off debate in order to offer certain amendments. The issue having been finally joined, Jones was supported by a vote of 183 to 84. Governor Johnston then arose to predict the direful results that would arise from a failure to ratify. One chief trouble seemed to be the mere mechanical inability of transmitting to the other States the amendments. North Carolina was to be out of the Union, a sovereign State, a foreign territory, for the time being. "We shall be entirely out of the Union and stand by ourselves. I wish gentlemen would pause a moment before they decide so awful a question. . . . We shall have no share in voting upon any of these amendments [to be submitted by the Federal Congress], for in my humble opinion we shall be entirely out of the Union, and can be considered only as a foreign power." The conservatives thought to frighten the radicals by asserting that the State would have to appoint ambassadors to the United States and to other foreign countries. It would take time to carry through the amendments, and in the meanwhile the great offices would be filled and laws would be made without the State having a voice in them.

Jones answered the first of these objections by saying that he wished to be out of the Union for the time. North Carolina ran no risk of being kept out of the Union in case she should later wish to come in, and that it was not necessary to send ambassadors to either the United States or to foreign countries. As to the second, relating to the offices, he added, with no doubt a great deal of secret joy, that "This is an objection of very little importance. Gentlemen need not be in such haste." He then mentioned a letter from Jefferson to Madison, in which Jeffer-

[17]Elliot's Debates, III, 57-74.

son expressed the hope that nine States would ratify, thus securing the benefits of a closer union, and that four States would reject, thus there would be a certainty of the adoption of the desired amendments.[18] He was ready to remain out of the Union until the amendments should be adopted.

The majority then submitted a proposed bill of rights containing some twenty sections and a list of amendments which it desired should be adopted. It was then determined, by a vote of 184 to 84, that North Carolina should neither ratify nor reject the Constitution. It was proposed also that the State Legislature should adopt a revenue law similar to any that should be adopted by the United States, and that the State should rapidly proceed to the redemption of its paper money.[19]

I cannot pass from this subject without saying a word of appreciation of the followers of Willie Jones, who have been so often criticized harshly. It seems to me that subsequent events largely justified their position, that the action of North Carolina had much to do in securing the adoption of the first ten amendments to the Constitution, and that the alien and sedition laws showed what a real foundation there was for the fear that individual rights were not sufficiently protected from Federalist interference, since even the amendments later adopted did not prevent their enactment.

So deep-seated was the Federalist suspicion of democratic legislation and political theories the movement in the United States Congress for the adoption of the amendments suggested by the various States was slow in progress, and it is quite conceivable that the party had no intention of submitting them, and would not have done so had it not been for the attitude of such States as North Carolina, the last named of which had acted with the specific purpose of forcing the amendments and of gaining time in which to observe if the new government was going to become tyrannical.[20]

So long as the Articles of Confederation remained operative the North Carolina representatives continued to serve in Congress, though those of Rhode Island withdrew immediately after the rejection of the Constitution by the State. In public law, I presume, however, the State resumed

[18] Elliott's Debates, III, 197; see also Jefferson's letter to A. Donald, *Works* (Washington), Vol. 2, 355. Jefferson later changed his mind and favored ratification first and amendment later, on the Massachusetts plan. *Ibid.*, 399, Jefferson to William Carmichael.

[19] *Ibid.*, 219.

[20] Jones remained irreconcilable in his opposition to the Constitution. When President Washington visited his home town and expressed the desire to see Jones, the latter had previously left town, stating that he would welcome Washington as the general who had won the war of independence, but not as President of the United States. Hoyt, *The Murphey Papers*, I, 204.

For a different view of the significance of the action of North Carolina, see Connor, R. D. W., *Governor Samuel Johnston of North Carolina*, (*North Carolina Booklet*, XI, 1912), 283-284. He states that the only result of the action of North Carolina and Jones was to keep the State "out of the Union for a year and thus to prevent the State's casting her vote for George Washington as the first President of the United States." The inference is also that he regards the action of the State as having little or no effect upon the adoption of the amendments to the Constitution.

an independent status in theory, just as in fact, as soon as the new government of the United States was set in operation. From March 4 to November 21, 1789, North Carolina had no legal constituent connection with the United States. There is no reason to suppose that the State could not have sent ambassadors or ministers to foreign powers, have made treaties and alliances, war and peace; and had the interval been longer, unquestionably these measures would have been adopted. The United States, maintaining an attitude of forbearance and respectful invitation, recognized the situation by making no laws which were designed to operate in North Carolina. Certain tariff laws were ultimately passed which were to regard North Carolina as a foreign country, though Dr. Williamson, representing the State as diplomatic agent to the Government of the United States, memorialized that Government against such a course.[21] The judiciary act was not to operate in North Carolina.

In diplomacy, North Carolina was represented by informal commissioners, notably Dr. Hugh Williamson, who was authorized by the State to begin negotiations for the equitable division of the debt, so that North Carolina should begin to take care of its share. He was to confer also in relation to favorable tariff and customs regulations. North Carolina also may be said to have communicated with Spain, through the Minister at Washington, relative to the Indian troubles on the western frontier and to the threatened war which might thus be fought with the reputed subjects of Spain, as the Indians were then regarded by some. In such contingency the State hastened to mobilize its troops and to prepare for the conflict, which was happily avoided for the time through negotiations carried on by the State. In domestic administration, the State's history presented no unusual types of incidents nor movements made extraordinary because of the peculiar situation of the State. Letters were exchanged between the two governments, between North Carolina and the Spanish Minister, Gardoqui, and between North Carolina and the French Consul at Wilmington, Ducher. Letters were also exchanged between Washington and Governor Johnston, as between two powers, relative to ultimate ratification of the Constitution.

Unquestionably there was a heavy reaction in favor of the Constitution during the year 1789, possibly due to the fear of serious complica-

[21]Wagstaff, *State Rights in North Carolina*, 29-30; *State Records*, XXI, 563. Congress recognized the separate and independent *status* of North Carolina and Rhode Island in passing the act of July 31, 1789, which reads, "Whereas the States of Rhode Island and Providence Plantations and North Carolina have not as yet ratified the present Constitution of the United States, by reason whereof this act does not extend to the collecting of duties within either of the said two States, . . . Be it, therefore, further enacted, that all goods, . . . which shall be imported from either of said two States of Rhode Island and Providence Plantations or North Carolina into any port or place within the limits of the United States, . . . shall be subject to the like duties, seizures, and forfeitures as goods, wares, or merchandise imported from any State or country without the said limits." For discussion of this and similar laws, see Tucker, *The Constitution of the United States*, I, 283 *et seq.*

tions with the Indians in the West, to anticipations of injury to commerce through the operation of the tariff and navigation laws of the United States, and to the fact, more than anything else, that Congress showed willingness to take up the subject of the amendments. Few, if any, had the intention of remaining out of the Union permanently. Though Willie Jones opposed the movements for a new convention as being a sacrifice of precious liberties, he was not successful, and petitions were sent in for such a convention. The Legislature agreed, and the convention, meeting at Fayetteville, ratified the Constitution by a majority of 118, the victory coming as a surprise, for, as Johnston said, the opposition was still "violent and virulent." The reaction was, if I read the records of the time rightly, superficial and temporary, rather than real and permanent. Once a member of the Union, North Carolina returned to the individualism of Willie Jones. Two incidents in 1790—the one a refusal on the part of the Legislature to take the oath of allegiance to the Constitution, the other a refusal of the court of equity of North Carolina to obey a writ of *certiorari* issued by the Federal court—showed how plainly sentiment was veering.[22] The advantages of the Union, however, prevented a break at that time.

The period in which North Carolina was an independent State possessed indubitably of its valuable sovereignty was so short that there was not opportunity for those dramatic and forceful expressions of power which would make it memorable. This absence is also due to the fact that the government was in the hands of the Federalists, who were seeking in all proper ways to effect the ratification. Still, the action of the State was not without its great service, practically and theoretically, to the nation and to the classical political theory of the South. Its example did much to effect the amendments—that was the chief purpose—and in political theory it goes far to prove that Mr. Lincoln was in error in assuming that there had been no States other than Texas which had exercised sovereign powers. It also goes far to overthrow the idea of Webster, as a historical fact, that the people, irrespective of State lines, had been those referred to in the preamble of the Constitution.[23]

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[22]Wagstaff, *State Rights in North Carolina*, 32-33.

[23]For a discussion—based on the same theories as are presented in this paper—of the nature of the revolution by which the Constitution was framed and adopted as well as regards the status of the States under it, see Pierson, *Texas v. White, A Study in Legal History*, 47-64.

Suffrage in North Carolina

BY W. S. WILSON.

The proverbial conservatism of North Carolinians is nowhere more apparent than in the tardiness with which they demanded, and finally obtained, the right to cast their ballots for the men selected to serve them in official capacity. The idea now prevalent that public officers are public servants, and are under certain well-defined obligations to the people whom they represent, is one which has taken more than a century to grow to its present proportions, and it is as yet an unfinished product. Each generation since the adoption of our first Constitution has brought us some measure of development of the part the people as a whole should have in the administration of governmental affairs. Prior to this time, under both the proprietary and colonial governments, they had but small part in the selection of the men who governed them. The main source of authority was vested in the hands of the representatives of the proprietors or those of the crown.

It is true, with certain restrictions, they were permitted to vote for members of the legislative body, but in most cases they had but little voice in selecting the men for whom their ballots were cast, so that the election was largely a matter of form. The judges, sheriffs, clerks, justices and other officers were appointed by the Governor from the class which would now be denominated the "ring politicians," and these officers and their friends selected the candidates for the Assembly, and saw to it that they were elected. In some instances the masses of the people in a county met and nominated a candidate, and on rare occasions elected him, but the election of representatives of this class was an exception rather than the rule. While the Governors, in many instances, were men who earnestly tried to administer the government in the interest of the people, they were of a different mold and necessarily had but an imperfect understanding of and little sympathy with the hard life of the times.

No law enacted by the Assembly could become effective until approved by the Governor, and his acts were subject to the review of the home authorities. So it was but natural that the Governors and their councils were often harsh and overbearing with the Assembly, while it was openly, and doubtless justly, hostile to the powers that checkmated and disapproved the laws which its members enacted.

Under these conditions, with a government which was in fact most tyrannical and almost entirely devoid of the principle of representation

on the part of the governed, the people became restless and dissatisfied and frequently presented their grievances through memorials to the Assembly, which was, in fact, in but little better condition so far as real power and authority were concerned than the petitioners who sought relief.

The representatives of this government who had in hand the administration of the laws were not men chosen by the people or in sympathy with them, but were appointees of the Governor, who in many cases rewarded them with these honors and emoluments for political purposes, or, worse still, to enable them to make an easy living from the hard-earned taxes of the people. Abuses of these trusts, both real and imaginary, tended to make even wider the gulf between the government and the governed. Organized, open revolt to authority in many parts of the State was a frequent occurrence prior to the Declaration of Independence in 1776.

The wilds of the new world had given birth and strength to a people whose ideas and aims had constantly grown away from the mother country and the government it was administering for them, and though at first sentiment dared not go to the extreme demanded by self-interest and the awakened consciousness that a new nation had been born, it is evident that the people, misgoverned and dissatisfied as they were, were ready and anxious to cast their fortunes with their sister States and strike for freedom and the right to establish a government of their own making.

Although the written law embodied in the Constitution of 1776, which was the result of this concerted determination, contained but little more in the way of placing an effective ballot in the hands of the voters than they had had before, it did contain provisions by which the property owners controlled the government in all its branches. These leaders who met to frame a chart for the future were, after all, men of English training and sympathy, comparatively few years removed from English custom and conservatism, with the ideals of the English system of land tenure and value; and though they were ready to sacrifice their lives for the cause of freedom, they readily subordinated the individual to the land they were preparing to defend. They agreed upon a constitution and promulgated it as the fundamental law without submitting it to a vote of the people. So that the government planned and carried into execution by them was not a democracy as the term is now understood, but the real, effective basis of suffrage was the possession of a freehold of as much as fifty acres of land. The ownership of property was a prerequisite to the selection of candidates for Governor, as well as members of the Senate. Only freeholders were permitted to vote for Sena-

tors, while all electors who had paid their taxes might vote for members of the Assembly. Each county, regardless of size or population, elected one Senator and two Representatives, who, on joint ballot, elected the Governor and other State officers for a term of years, with the exception of the judges, who were elected for life.

Although at this time the right of suffrage had not apparently been considerably extended since the people had previously voted, under similar restrictions, for members of the General Assembly. In fact, the Legislature, instead of the Governor, now became the controlling factor in the government, whereas it had been but a feeble and ineffective body. The Governors were elected by it, and as they were eligible to reëlection a very limited knowledge of human nature will convince one that under these circumstances they would not vary far from the dominating ideals of the Legislature if they were able to fathom and follow them. The judiciary was more independent, as its members held office for life, but the legislative will, which was determined largely by the people though under restricted suffrage, dominated and shaped the course of the government. Here petitions could be dealt with effectively, laws could be enacted without hindrance by foreign influence, and a Governor, subject to the will of the Assembly, could be depended upon to have them properly administered.

While under this constitution there was no foreign power to contend with it was quickly realized that as between the residents of the eastern and western sections of the State there were irreconcilable differences of opinion. The two sections had been settled independently of each other. The residents of the one section had but little in common with the residents of the other. The flat, fertile lands of the east produced abundantly and the streams offered transportation facilities for marketing produce and an inlet for outside commodities. Slaves were profitable, and, as values were counted in those days, this was the rich and aristocratic part of the State. The west, on the other hand, settled mainly by Scotch-Irish and people of German birth, who cared little for slaves and possessed but comparatively few of them, was more progressive and fought valiantly through its representatives in the Assembly for advanced ideas in legislation. They advocated the adoption of a system of internal improvements, road building, the establishment of a system of free schools, and, above all, a fair representation in the Assembly based upon the area and population of their territory. These reforms met with but little encouragement, and generally with decided opposition from the eastern representatives, who were satisfied with the conditions they had brought about, and steadfastly refused either to accede to the demand for progressive legislation or to permit the division

of the larger counties of the west, which would have endangered their long established power to control the government. That the demands of the west were justified may be well established by the single fact that of the sixty-four counties of the State, thirty-six were east of Raleigh. The voting population of these counties was only 8.7 per cent of the total white population, but it chose a majority of the General Assembly, and therefore elected the Governor and dominated the entire State government. The sectionalism developed during this period became the chief source of constitutional and political controversy for almost a hundred years.

For a quarter of a century prior to the time some measure of relief came to the west its representatives fought valiantly for a change, and among other things pointed out that, owing to the reactionary spirit of the east, the State was not only poor, but was growing poorer; that half of the white population was illiterate, and that thousands of its sturdy citizens who were dissatisfied and disgusted with their home government had gone to other States. An estimate of these emigrants placed the number at more than five hundred thousand.

A constant and merciless publicity of these facts expounded by the virile and active leaders of the progressive west finally won recognition for their section and resulted in calling the Constitutional Convention of 1835. There were in this body strong representatives of the two conflicting schools of political thought—those from the east battling for the maintenance of present conditions, and those from the west equally bent on uprooting and changing the entire scheme of government. In the final outcome neither side was successful, but the work of the convention was largely a compromise. The county unit of representation was abolished and a new system was created. Population was made the basis for the apportionment of the one hundred and twenty members of the House of Commons. To each county was assigned one member and the remaining members were distributed according to population; but by reason of the fact that three-fifths of the slaves were included in estimating the population, the east still retained its advantage in the House of Commons. The Senate was to be composed of fifty members to be elected from districts created from territory according to the value of property listed for taxation. Here also the east asserted itself. The most significant and far-reaching step taken by the convention was that which placed the election of the Governor in the hands of the people. The restrictions which had prohibited Catholics from holding office were removed, the ballot was taken from free negroes, and biennial sessions of the General Assembly were provided for. Probably, however, the most democratic act of this convention, and one which showed more

clearly the ascendency of the popular will, was the submission of these amendments to a vote for their ratification. This was the first time the people had voted on a Statewide measure. Although the east opposed the adoption of the amendments, and particularly the one providing for the election of Governor, alleging that it would necessitate political campaigns which would destroy the fundamental principles of the government established by the fathers, they were adopted—the west voting for and the east against them.

Prior to this time there had been no State issues. The only officers elected were the members of the Senate and House. Hence no Statewide measures had been considered. The person elected Governor by the General Assembly had not only been, in a great majority of cases, entirely unknown to the voters, but he was independent of them, and therefore felt under no obligation to them for his office. Party lines in the State were determined entirely by national questions. There were no State parties as such, and necessarily no State organization and but local and fitful interest in State affairs.

For the first election under the new constitution Statewide political organization was impossible, and the habits of the people were too thoroughly fixed upon national affairs for matters of State concern to play an important part, but when the election returns were canvassed the progressives, who had forced the convention, elected their candidate for Governor and thus entrenched themselves in power for more than a decade, during which time a policy of progress, education and internal improvements was established which turned the tide of emigration and laid the foundation for the upbuilding and development of the State. Regardless of local party ascendency the people came to realize and appreciate the State idea as opposed to the county or local unit on the one hand and the interests of the Nation on the other.

Having advanced so materially under the compromise measures of 1835, it is not surprising that within a few years there should arise further agitation for suffrage reform. The Senate was still the representative of the landed class and only freeholders could vote for its members. The slaves of the east, while not permitted to vote, were counted to the extent of three-fifths of their number in determining the county representation in the House of Commons. Free suffrage and a change from the basis of property to one of population in determining the senatorial districts came to be live political questions. Again the east and west met in political battle. Beginning with a bill in the Legislature of 1842, these questions came in 1848 to be the leading issue between the two political parties. In this campaign the progressives were defeated by a slight majority, but they won easily two years later.

Division of opinion among the members of the Legislature as to the adoption of one or both of these measures, and whether the necessary changes should be made by the Legislature or by a constitutional convention, and the further fact that it was necessary to pass constitutional amendments by two sessions of the Legislature, delayed the submission of either amendment for six years. Only one amendment, that which eliminated the freehold requirement, was then submitted, and it was adopted by a vote of two to one in its favor. Thus it had taken eighty years of agitation to secure the right of free suffrage which had been withheld regardless of the fact that the original constitution had declared "that all political power is vested in and derived from the people only."

At last manhood suffrage prevailed and each citizen was given the right to cast his ballot for all the elective officers of the county, State, and Nation. The spirit of democracy had triumphed and the State made rapid strides in governmental betterment and development. It established schools, built roads, canals, railroads and manufacturing plants. Its population and wealth rapidly increased, its schools were being multiplied and the attendance was growing, and all told, the State was keeping step with her sister States in general progress. Then came the devastating period of civil war. Emerging from its blight and bitterness, bankrupt and sore at heart, its people were forced with an iron hand to undergo the reconstruction period, when might not right, vengeance not justice, passion not poise, wrought shame, degradation and disaster, which were as painful and humiliating as had been the fortunes of war.

The old order passed away. Under the new constitution, officers who had been appointed were made elective, and the scope of suffrage was thus enlarged and extended. The right of suffrage was extended to negroes who were incapable of its proper exercise. They became the willing tools of designing white men, resident and imported alike, while numbers of the best white men were disfranchised. Thus a race which had never taken part in government was given the balance of power, which it retained for a generation in many parts of the State. Intolerable political conditions resulted in the eastern half of the State to such an extent that its representatives in 1899, manifesting the same spirit which in the Convention of 1835 deprived free negroes of the right of franchise, proposed and enacted an amendment to the Constitution providing an educational qualification for voters. To this qualification was appended a proviso to the effect that those persons who had voted before 1868, or their descendants, should be permitted to have their names entered on a permanent registration list prior to 1908, and such

persons were exempted from the educational test. Since 1908 all new registrations have been made upon the basis of an educational qualification.

To attacks upon this amendment as an unfair discrimination against the negro, no better answer can be given than the fact that the change has been alike beneficial to both races. The negroes have been temporarily removed from the realm of politics. Schools and every other facility that are offered to the whites are open to them, so they may qualify themselves by education and training for a proper exercise of the ballot and an intelligent participation in governmental affairs. The feeling between the two races is better than ever before, and financially and morally they are going forward in a manner and at a rate which would have been impossible under former conditions. Progressive policies of government are proposed, discussed and settled on their merits without appeal to race prejudice; both elements are spared disagreeable references to former conditions, and each shares alike the advantages and improvements thus made possible through better legislation. The State is making every possible provision for their betterment and development, and the race question, if left alone by persons who are not familiar with local conditions, will eventually solve itself.

During the sixteen years since the adoption of this amendment the State has gone forward by leaps and bounds. New schoolhouses have been erected at the rate of more than one each day, taxable values have doubled, banks and bank deposits have been multipled many times, and along all lines of endeavor the State is keeping step with the progress of the age.

A Statewide primary law has been enacted and tried out with satisfactory results. It should and will be improved and made more effective in registering the will of the people, but the principle of the law is democratic and no backward step will be taken in reference to the primary idea.

The necessity of providing some method for relieving the General Assembly from the mass of local and private legislation which has been constantly increasing, coupled with the initiative and referendum in municipal and county government, have but recently made possible the enactment and adoption of four constitutional amendments which will widely extend the exercise of the franchise in determining questions of immediate local concern. Under general laws to be enacted by the General Assembly the right of local self-government for counties and home rule for municipalities is now assured.

Continued agitation and discussion will sooner or later lead to the enactment of additional suffrage measures. In this day of educational facilities, when all callings and professions are not only open to, but

are largely filled by women as well as men, we cannot long stand by and deny to our equals in culture, in understanding and appreciation of the problems of the day, and in that interest and sympathy which are so essential in the extension of helpful agencies, the right to share with us the privileges and responsibilities of the ballot.

As the best government is that which depends not upon force, but upon the creation and development of agencies for service, so the most representative government is that which takes into account the rights and interests of all the people, women as well as men, and gives them all a like part in the administration of its affairs. Equal suffrage on this basis is the question we shall soon be called upon to solve. Its solution will come not after campaigns of bitterness and passion, but after a period of persistent publicity and appeal to the spirit of right and justice and fair dealing.

The initiative, the referendum, the recall, proportional representation, and other forms of extension of the franchise will in time present themselves for consideration.

Each extension of the right of suffrage, save in the case of the negro, has been followed by improved economic, industrial and social conditions. Government has gradually, but surely and rightly, grown away from the idea of repression and force, and is becoming, as it should be, an agency for the betterment of the condition of the people.

Instead of spending half the State's income for legislative expenses and the other half for administering punitive laws, these items are now insignificant. The building and maintenance of schools and colleges, the better and more adequate payment of teachers, the administration of health laws, the advancement of agricultural education and demonstration, the care of the unfortunate, the establishment of a system of good roads and the hundreds of other constructive measures which come close to the people—these are the problems which face the lawmakers of today.

Step by step, slowly it is true, but nevertheless in a forward direction, with a conservatism which bespeaks both courage and conviction, the people have wrought wisely and well not only in reference to the suffrage, but the hundreds of other great legislative and economic questions which fall to the lot of a great commonwealth containing many diverse and conflicting interests. The history of their achievement is one of which we may be justly proud.

With a confidence born of experience we look forward with faith to a proper and just development and extension of all the agencies of governmental service and a proper solution of the problems confronting us, in a manner which will be in keeping with the highest ideals of a liberty-loving and patriotic people.

History of Crime and Punishment in North Carolina

BY THOMAS M. PITTMAN.

Old-time punishment was vindictive. This was not merely a theory of punishment, but an expression of the spirit which pervaded society. Even sports were rough and often brutal; and when for variety's sake the shilalah and hawthorn were suffered a little rest, there was yet an appetite for the grotesque and horrible, grinning matches, for example, in which Addison tells us—

> "The frightfull'st grinner
> Be the winner."

The colonists brought with them to North Carolina the English criminal law as it was then in force. This embraced the English common law of crimes and its then existing statutory modifications.

This common law is continued in force in North Carolina by statute: "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of or repugnant to or inconsistent with the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, nor abrogated, repealed or become obsolete, are hereby declared to be in full force within this State."

In general, punishments are now, with us, prescribed by statute. For felonies where no specific punishment is prescribed, it is limited to two years imprisonment in the county jail or State's Prison or fine, in the discretion of the court; or if the offense be infamous, to such imprisonment for not less than four months nor more than ten years, or fine. In misdemeanors where no specific punishment is prescribed it shall be as for misdemeanors at common law; but if infamous, or done in secrecy or malice, or with deceit and intent to defraud, it shall be by imprisonment in the county jail not less than four months nor more than ten years, or fine.

There were inflicted for crimes at common law, capital punishment, imprisonment, fine, pillory, tumbrel or ducking stool for common scolds, stocks and whipping. Transportation, which entered so largely into the settlement of English colonies, did not exist at common law, and was first introduced by statute of 39 Elizabeth, enacting "that such rogues as were dangerous to the inferior people should be banished from the realm." The first statute in which the word "transport" appears is

18 Car. II, which gives a power to the judges, at their discretion, either to execute or transport to America for life the Moss troopers of Cumberland and Northumberland.

Gruesome pictures have come down to us of English methods in the infliction of punishment, and the law books furnish strong corroboration of the most sensational fiction. Blackstone says that capital punishment "consists generally in being hanged by the neck till dead, though in very atrocious crimes other circumstances of terror, pain, or disgrace, are superadded; in high treason affecting the king's person or government emboweling alive, beheading and quartering; and in murder a public dissection." An old form of sentence concludes, "and there be hanged by the neck until he be dead, and that afterwards his body be dissected and anatomized."

The law was not yet satisfied, but upon every judgment of outlawry or of death, for treason or felony, a man was said to be attainted, *attinctus,* stained or blackened, from which there were two consequences: forfeiture of property and corruption of blood. Even this was extended by "bills of attainder" in Parliament, where special acts of attaint were passed in particular cases not embraced by the general law.

Both in law and practice, North Carolina was the daughter of her mother. The first charter authorized the Lords Proprietors in person and by their deputies, etc., to make laws, and to execute . . . by imposition of penalties, imprisonment, or any other punishment; yea, if it shall be needful and the quality of the offense requires it, by taking away member and life, . . . *Provided, nevertheless,* that the said laws be consonant with reason, and as near as may be conveniently, agreeable to the laws and customs of this our Kingdom of England." In strict conformity with the act of 1741, being Chapter XXIV, section 48, Iredell's Revisal, the following judgment was rendered in Duplin County:

"At a special court begun and held at the Court House in Duplin County on Thursday the 15th day of March in the Year of Our Lord 1787, for the immediate Tryal of Darby and Peter two Negroe Slaves the Property of the late William Taylor Esq. now committed and to be tryed for the Murder of the said William Taylor their Master, which court being summoned and convened by the Sheriff of the said County and being duly Qualified according to law, were Present, to wit:

Thomas Routledge
Joseph Dickson
James Gillespie
} Esquires Justices

Lewis Thomas
James Middleton Sr.
Isaac Hunter
Alexander Dickson
} Freeholders. All being owners of slaves and unexceptionable according to law.

The said Negro Man Darby being brot. before the Court did Confess that he did on the Thirteenth day of this Instant Month felloniously Maliciously and Willfully murder his said Master William Taylor by striking him on the head with an ax into his Brains of which wounds his said Master instantly Died whereupon the Court doth pass this Sentence in the word following to wit that the said Negro Man Darby be immediately committed to Gaol under a good Guard and that on Tomorrow between the Hours of one and Four o'clock in the afternoon he be taken out thence and tied to a Steak on the Court House lott and there burned to Death and to Ashes and his ashes strewed upon the Ground and that the Sheriff see this Order Executed.

The said Negro slave Peter a boy about fourteen years of age being also brought before the Court and examined did Confess that he was present when his Master the said William Taylor was murdered and that he did aid and assist his Brother the aforesaid Darby in committing the said Murder the court having taken into consideration the youth of the said Peter and considering him under the Influence of his said older Brother Darby, have thought proper to pass this sentence in the following words to wit:

That the said Negro boy Peter be committed to the gaol and there to Remain under a Good Guard, till Tomorrow, and then between the Hours of one and four o'Clock he be taken thence and tied to a Post on the Court House lott, and there to have one half of Each of his Ears cutt off and be branded on each Cheek with the letter M and Receive one hundred lashes well laid on his bare back and that the Sheriff see this order Executed.

To which Sentences the Court have hereto Subscribed their Names.

THOS. ROUTLEDGE
JOSEPH DICKSON
JAMES GILLESPIE
LEWIS THOMAS
JAMES MIDDLETON
ISAAC HUNTER
ALEXANDER DICKSON.

Test W. DICKSON, C. C.[1]

Others of like character are noted in the Colonial Records.

One other instance will sufficiently illustrate the extreme application of the harsh laws in force in this State as late as 1771. It is the case of the Regulator, Capt. Benjamin Merrill. The conclusion of the sentence was as follows:

"I must now close my afflicting duty by pronouncing upon you the awful sentence of the law, which is, that you Benjamin Merrill, be carried to the place from whence you came, that you be drawn thence to the place of execution, where you are to be hanged by the neck; that you be cut down while yet alive, that your bowels be taken out and burnt before you face, that your head be cut off, your body be divided into four quarters, and this to be at his Majesty's disposal."

The sentence was pronounced by the chief justice, the execution waited upon the pleasure of Governor Tryon, and the occasion was

[1]Copied by R. D. W. Connor from the Court Record of Duplin County, at Kenansville, May 1, 1907.

graced (?) by the presence of a number of the most distinguished gentlemen of the State.

Attainder, too, was recognized both in law and practice. In the case just mentioned, we are told that Captain Merrill made earnest appeal to have his wife and children spared the forfeiture of his property, and Governor Tryon was pleased to make a recommendation to that effect to the Crown.

In the Assembly the Commons, on April 22, 1782, named Mr. Nash, Mr. Sharpe, Mr. Person, Mr. J. Johnson, Mr. Spaight, and Mr. McCullock on a committee to act jointly with such gentlemen of the Senate as may be appointed to prepare and bring in a bill of attainder. Messrs. Bryan, Bledsoe, and Lochhart were named on the part of the Senate, and the bill was duly introduced and passed to attaint certain persons therein named of treason, to pardon others on certain conditions, etc.

In effect, Chapter III of the first session of 1777, Iredell's Revisal, page 284, had covered the same ground without using the word attainder or decreeing the corruption of blood.

How extensively these acts applied will appear, in a measure, from Chapter VI, 1782 (Iredell's Revisal, p. 425), which declared absolutely forfeited and directed the sale of lands, tenements, hereditaments, negroes, and other estates, real and personal, which were on the fourth day of July, A. D. 1776, the property of the following persons, to wit: William Tryon, Josiah Martin, Esquires, Sir Nathaniel Duckinfield, Henry McCullock, Henry Eustace McCullock, Samuel Cornell, Edmund Fanning, and others—in all, about seventy-five persons.

It was finally provided by the Constitution of 1868, still in force, "No conviction of treason or attainder shall work corruption of blood or forfeiture." Art. IV, sec. 5.

One feature of the English criminal law which was also transplanted to North Carolina had a highly ameliorating influence upon the harsh punishments of our earlier days, and is too interesting to be omitted from this paper. It was known as "benefit of clergy."

Blackstone says "this had its origin from the pious regard paid by Christian princes to the church in its infant state, and the ill use which the popish ecclesiastics soon made of that pious regard." The exemptions which they granted to the church were principally of two kinds: (1) Exemption of *places* consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries. (2) Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original meaning of the *"privelegium clericale."* This exemption, allowed first only to the clergy,

then extended to clerks, and later to all who could read, was availed of by a plea claiming benefit of clergy, first as to particular offenses, but finally in all felonies, whether new, created, or by common law, unless taken away by express words of an act of Parliament, which explains the old enactments in this State, which imposed the death penalty, and closed "without benefit of clergy." Upon the plea being allowed, the party was "burnt with a hot iron in the brawn of the left thumb" and discharged. There remained in the judge, however, a discretion to substitute imprisonment, whipping, etc., for the burning. All this, of course, was in lieu of the death penalty.

This exemption has been repeatedly claimed and allowed in North Carolina. In *State v. Carroll,* 24 N. C., 257, upon a conviction of grand larceny, the defendant was called upon to show cause why sentence of death should not be imposed upon him. He craved benefit of clergy, whereupon the court adjudged "that the prisoner be twice whipped, and receive at each of said whippings thirty-nine lashes on his bare back."

In *State v. Elizabeth Gray,* 5 N. C., 147, the defendant claimed benefit of clergy. The case was appealed to the Supreme Court upon the question of a woman being entitled to the plea, and was disposed of by a short *per curiam* decision. "No reason can exist at this day why females shall not be entitled to benefit of clergy."

Finally benefit of clergy was abolished and the English statute of 7 and 8 George IV. was enacted in this State, and first appears in the Revised Code, ch. 34, sec. 22, as follows: "No person convicted of felony shall suffer death unless it be for some offense which was excluded from the benefit of clergy before, or on the day when the enactment takes effect."

Prior to our Civil War corporal punishment was resorted to in preference to imprisonment, and there was required to be "kept and maintained in each and every county in the State a courthouse, common jail, and *stocks.*" There are frequent instances in our records of mutilations of a character not to be mentioned in this company, and one case in which Dr. Anthony Newton was paid for amputating the hand of John Burnett, "a notorious felon." The nature of the offense is not stated. Aside from these, possibly the most severe corporal punishment between the Revolutionary period and that of the Civil War was for perjury, where the offender, after being fined not exceeding one thousand dollars, "shall stand in the pillory for one hour, at the expiration of which time both ears . . . shall be cut off and severed entirely from the head, and the ears so cut off shall be nailed to the pillory . . . and there remain until the setting of the sun; and the person so offending shall be ren-

dered thereafter incapable of giving testimony in any of the courts of this State." Rev. Stat., ch. xxxiv, sec. 50. In the Revised Code, eighteen years later, one or more public whippings, "not less than thirty-nine lashes on his bare back," were substituted for cutting off the ears.

A discussion of crime and its punishment under the Constitution of 1868 is by no means an easy task. That instrument is distinguished throughout by a high regard for human liberty, and generally for its humanitarian spirit. Offenses punishable with death were reduced to four in number, and of those, burglary in 1889 and murder in 1893, were divided into two degrees, only one of which is capitally punished. Corporal punishment was abolished. A penitentiary was established, and imprisonment for high crimes and fines for petty misdemeanors was the dominant note in the new order. Previous to that time the longest term of imprisonment named by law was three years; now, with the abolition of the death penalty, the limit has gone to thirty years, and it is by no means a dead letter.

It can hardly be claimed that the new policy has been developed either by the Legislature or the courts in quite the spirit of the Constitution. The confinement and guarding of criminals is an expensive proposition, and it was found difficult to make the State and local prisons self-supporting by the labor of the prisoners within those institutions. There was superadded to the imprisonment authority to farm or hire out prisoners, or employ them upon the roads or upon other public works, so that it became, in a measure at least, a speculation in cheap labor, which has not been free from abuse.

The laws abolishing imprisonment for debt and creating the homestead and personal property exemptions, together with the preëxisting insolvent debtor's law, have apparently contributed to the embarrassment of our criminal system. They have greatly impaired the ability of the courts to give relief against persons of small means who fall short of their obligations in matters heretofore remediable in civil actions. It is almost certain that this measurably accounts for the ever-pressing demand upon the Legislature to create new offenses to cover real and fancied grievances, and too often, there is reason to suspect, for the purpose of winning some selfish advantage not otherwise attainable. It is pertinent in this connection to note the increase in the body of our criminal law. The Revised Statutes, published in 1837, covering the accumulated legislation of more than one hundred and fifty years, had ninety-one sections in its chapter on Crimes and Punishments. The Revised Code, published eighteen years later, in 1855, had one hundred and twenty sections in that chapter, while Pell's Revisal, published in 1908, has five hundred and seventy-six sections. Many of these statutes

are wise and just, and the natural and legitimate outcome of new and rapidly changing conditions, but so great an increase in the body of the criminal law can hardly indicate a healthy system.

The history of crime and punishment cannot be separated from the judicial administration of the criminal law. The rotating system by which our courts change judges twice every year has been destructive of steady and uniform administration of the criminal law, and has created in the public mind an impression that punishment rests in the caprice of the judge, rather than in his discretion or any law of the land. As if this were not enough to strain the system almost to the breaking point, recorders' courts have been set up here and there over the State. They have no place in the judicial system contemplated by the Constitution; they are not required to be presided over by men versed in the law, but such as they are, may determine, without a jury, cases upon which experienced Superior Court judges would not dare intimate an opinion for fear of discipline by the Supreme Court. Here we may see a road sentence of a year or more imposed for an offense which experienced judges dispose of with a fine of twenty dollars.

Under these conditions a discussion of crime and punishment would mean a consideration of individual cases, and the lack of unity, symmetry, and scientific development of the criminal law and administration which are essential to the protection of the public and the reform of the criminal. This would carry us beyond the scope of this paper.

It would be a grave wrong to society and to this Association to leave this subject without calling earnest attention to the serious menace to society which these conditions entail. Human liberty is become a jest in the courts, and among those whose duty it is to conserve it. Leading newspapers praise judges and solicitors for the number of convictions and the aggregate number of years of prison sentences imposed. We cannot hope for great improvement while courts get their living from the costs and counties get labor for their public works at an expense of board for the prisoners and the payment of court costs. The selfish element is too great a consideration. Good citizens need greatly to bring to the investigation of our criminal law their best intelligence and their best humanity.

This paper would fail to present a true account of the history of the administration of the criminal law in this State if it omitted mention of certain beneficent provisions of our law.

1. Boards of county commissioners are authorized to establish houses of correction in their respective counties, issue bonds to raise money for their establishment, levy taxes for their maintenance, and appoint a manager and directors for their government.

2. The directors of the State's Prison are authorized to establish a reformatory, either within or outside the prison, where convicts under the age of 15 years shall be confined separate and apart from other convicts.

3. Offenses by any minor under the age of 16 years, where the punishment as now fixed by law cannot exceed ten years, shall be misdemeanors, and he may be sentenced to a house of correction, fixing a minimum and a maximum term, the latter not to exceed ten years. At any time after the expiration of the minimum term the authorities in charge of such offender may let him out on parole upon such terms as may be deemed wise and just, not to extend beyond the maximum term. Under certain circumstances the sentence may be to the county farm or to a public or private reformatory, or offenders may be apprenticed. Any such offender may be recaptured if he violates his parole.

4. The most practical agency at this time for dealing with youthful criminals is the Stonewall Jackson Manual Training and Industrial School. It grew out of the hearts of the good women of the State. It is being worked to its full capacity and is a splendid example of remedial punishment instead of vindictive.

These provisions, except the last named, are now dormant and largely unknown, but they are instruments ready to our hands to begin the process of saving the beginners in crime, by which we shall cure and not destroy those who go astray.

North Carolina Bibliography, 1916

BY MINNIE W. LEATHERMAN.

The Bibliography includes publications issued from the date of the last meeting of the Association, November 8, 1915, to the date of the present meeting, December 5, 1916. In the two preceding reports articles appearing in periodicals were listed as an experiment, but the plan did not prove feasible. Hence periodical literature is not included in this Bibliography and probably will not be in succeeding reports.

BOOKS

KEY TO ABBREVIATIONS: c, copyright; ed., edited; il., illustrated; p., pages; por., portrait; v., volume; S., D., O., refer to size of book.

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The *South Atlantic Quarterly, North Carolina Education, North Carolina Library Bulletin, Social Service Bulletin,* and the publications of the various colleges and universities have been issued regularly during the year. A new magazine, *Everywoman,* made its appearance in October, 1916, and will be published monthly.

Members for 1916-1917

AMPERE, N. J.
R. C. Petty.

ANSONVILLE.
Maj. W. A. Smith.

ASHEBORO.
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